New INDIVIDUALIST Review

ANTITRUST AND COMPETITION

ROBERT M. HURT

REFLECTIONS IN BERLIN

RALPH RAICO

THE JUDICIAL PHILOSOPHY OF FELIX FRANKFURTER

MARTIN GLASSER

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Antitrust and Competition

ROBERT M. HURT

> If [the businessmen] like freedom and don't want outright control, then they've got to stand up and be good citizens. They've got to quit their informal conforming and doing business the easy way. They're going to have to, we might say, expose themselves to the rigors of competition."
>
> . . . . . .
>
> "We must hold open opportunities for a man with an idea so that, with a little capital, he can go into business and have a fair chance, by his ingenuity, to grow and become big himself. This is very difficult if you subscribe to what is called "hard" competition. Competition of this kind is war in a jungle, where only the big man can survive."[1]
>
> Paul Rand Dixon, *Chrm. of the Federal Trade Commission*

GOVERNMENT AND PUBLIC alike are now exhibiting a case of schizophrenia in their attitude toward competition, complete with separate vocabularies. On the one hand, a group of business executives are given jail sentences for fixing prices in violation of the Sherman Antitrust Act and are paraded before the public as enemies of society. They are charged with obstructing the market and thereby injuring the public. Even in those circles in which Adam Smith and his kin have been consigned to the innermost hell, his arguments against cartelization are accepted: independent pricing by each competitor in an effort to maximize his profit will result in lower prices and greater output than collusive pricing. Although collusion might bring greater security and greater profits to the participants, it is allegedly the philosophy of the antitrust laws that these are offset by disadvantages to the public. In the lexicon of our commentators, the goal is "competition" and the departure is marked by "conspiracy," "doing business the easy way," "oligopoly," and "directed prices."

On the other hand, in a continually expanding area, both federal and state governments embark on a calculated policy of encouraging the same results the price fixing prosecution was designed to prevent. In this area, the very type of competition which is likely to bring lower prices is prohibited. Here the vocabulary is given an Orwellian twist in its mimicry of the language used to describe a competitive market. The goal is "orderly competition" and "fair trade," the departure the "war of the jungle" and "unfair competition." The price cutter, in the words of President Roosevelt, is a "chiseler"; the competitor hurt by lower prices is deprived of his "fair chance" and "right to compete." It can be seriously argued that certain types of business conduct described as "unfair competition," especially in the area of fraud,

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[1] *U. S. News and World Report*, July 17, 1961, p. 65.

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can be proscribed with no adverse effect on price competition. This article deals with the sphere of government intervention which is clearly protectionist in character and acts to thwart the market at least as decisively as the conduct of the imprisoned executives.

The government's most grandiose attack on competition was the National Industrial Recovery Act of 1933, enforcing industry drafted codes, of which 85% contained provisions for fixing minimum prices. The President of the United States Chamber of Commerce stated the underlying philosophy of the Act:

> "The time has come when we should ease up on these laws and under proper government supervision, allow manufacturers and people in trade to agree among themselves on these basic conditions of a fair price for the commodity, a fair wage, and a fair dividend."[2]

After a period of horror, in which even an investigating committee appointed by Roosevelt denounced the whole undertaking as a "regimented organization for exploitation," the Supreme Court put the monster to death amidst sighs of relief even of some of its original supporters. This experiment with "corporativism" of the continental variety probably had the redeeming effect of leaving an understandable antipathy for such comprehensive legislation.[3]

The ghost of the NRA philosophy, however, lingers in a surprisingly large part of our economic life. Allocations of quotas to oil producers by state governments are enforced by the federal government. The producers argue that the purpose of the arrangement is conservation of dwindling reserves rather than higher profits, while they lobby for depletion allowances to allegedly encourage exploration and exploitation of oil fields. Over half the states have retail price maintenance laws (euphemistically dubbed "fair trade" laws) preventing price competition among retailers in a wide range of brand name products. These are exempt from the antitrust laws under the Miller-Tydings Act. While regulatory agencies are usually associated with the setting of maximum rates, there is an increased willingness on the part of the Interstate Commerce Commission and the Civil Aeronautics Board to set minimum rates to "protect competition." An increase in the minimum wage is openly advocated as a means of protecting Northern industry from the lower prices of low wage Southern industry. The avowed goal of our farm program is to keep prices high enough to enable all those wishing to remain farmers to achieve, as Kennedy promised during the election campaign, a return on investment equivalent to that obtained in business. And, of course, protective tariffs and other trade restrictions have from time immemorial sacrificed lower prices, greater output, and increased efficiency of specialization resulting from the free movement of goods for the greater security and profits of the protected industry.

While a complete list of clearly protectionist legislation, of which the above is a small sampling,[4] would be grim reading for persons of almost any political persuasion, I find the most distressing developments in that supposed citadel of free competition, the antitrust laws. The remainder of this article deals with these developments. In 1911, Justice White enumerated the evils which the Sherman Act was enacted to combat:

> "The power which the monopoly gave to one who enjoyed it, to fix the price and thereby injure the public; the power which it engendered of enabling a limitation on production, and the danger of deterioration in quality of the monopolized article."[5]

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[2] Henry I. Harriman, quoted in Wilcox, *Public Policies Toward Business*, (Irwin, 1960), p. 351.

[3] The alleged purpose of the price control was to aid economic recovery. However, the expected result was born out by the Brookings Institute study which concluded that the Act, "on the whole, retarded recovery." Lyon, *et. al., The National Recovery Administration*, (Washington, D. C., Brookings Inst., 1935), p. 873.

[4] A complete list would include items not usually associated with price fixing, such as licensing of professional services.

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Protection of the consumers from these evils—higher prices, lower output, and deterioration of quality — was accepted by the courts as the criterion of Sherman Act enforcement.[6] This standard roughly corresponds to the criteria developed by classical economists to demonstrate the superiority of competitive enterprise, although it is by necessity a cruder standard. It has frequently been argued that some, or even all, of the methods adopted by the antitrust laws have not or could not achieve these goals. But no student of the antitrust laws would deny that their enforcers have in the past at least sought to protect the public rather than to secure the position and profits of high cost competitors. The appearance of success has been sufficient to persuade the Common Market nations, long the ideological home of government aided cartels and the anti-competitive mentality, to include antitrust provisions strikingly like our own in the Rome Treaty.

Recently, however, the antitrust laws have been used to achieve those very results which they are allegedly designed to prevent — to thwart developments which will lead to lower prices and the other advantages which flow from competition. This trend is not irreversible, especially in view of the fact that many of the important cases are still to be reviewed by the higher courts. Three of the most important developments are: (1) the proposed consent decrees in the electrical equipment price fixing cases, (2) recent applications of the Celler-Kefauver Anti-Merger Act, (3) the attack on price discrimination and the large buyer under the Robinson-Patman and Sherman Acts. Since this is a brief survey article, I cannot avoid some over-simplification; but the following discussion I believe captures the drift of the cases.

AFTER THE SEVEN executives were safely tucked away behind bars for conspiring to keep the price of electrical equipment "above the market price," the Justice Department proposed decrees which included a rule prohibiting the selling of equipment at an "unreasonably low price," to prevent competition which might drive smaller firms out of business.[7] Having prohibited agreements to thwart "competition," the Justice Department seems to desire that the big companies avoid actual competition. These companies would be left with the job of determining what is a "reasonable" price, with possible contempt proceedings, complete with jail sentences, threatening if they fail to calculate what the government and the courts consider an "unreasonably low price." Several customers of the convicted equipment suppliers, who are the very parties that the antitrust laws supposedly protect, have attempted to intervene in the case to protest this deprival "of the benefits of free price competition in the purchase of electrical equipment."

A ruling that big concerns should set their prices so as not to injure competitors would not only deprive customers of the benefits of lower prices; it would also place these larger companies in a preposterous situation. Should the price selected as consonant with safeguarding their small competitors be considered too high, the pubic is said to be the victim of "directed prices," and the authorities are exhorted to break up the "oligopoly." If the price is so low as to hurt some competitors, they are guilty of "monopolistic practices" and likewise subject to public outcry and prosecution. This would give a custodial role to large firms incompatible with any notion of

[5] Standard Oil of New Jersey v. United States, 221 *US* 1, 52, (1911).

[6] The courts have developed certain rules of thumb, declaring certain types of conduct illegal in all cases. (These are referred to as illegal *per se*). Into this category fall price fixing, market allocation, and joint boycotts. However, this was not considered a departure from the market standard, as the courts felt that these acts could have no other purpose than to injure the buying public. The market standard has been recently reaffirmed as the goal of antitrust enforcement in the important *Report of the Attorney General's National Committee to Study the Antitrust Laws*, (1955). p. 320.

[7] *U. S. News and World Report*, Dec. 4, 1961, p. 60.

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a free market. The only completely safe course would be to obtain a clearance from the Justice Department before making a price change. The dilemma of the large firm is summed up by Leland Hazard, an antitrust lawyer:

> "Antitrust doctrine forbids certain forms of hard competition. For example, GM would hesitate to price its cars as low as its efficiency might permit, for fear of driving Chrysler, American Motors, even Ford to the wall. As critics put it, businessmen must compete, but no one must win the competition. It is this aspect of antitrust which creates two standards, one for big business, another for small business. No matter how vicious the competition of the little fellow, the big fellow must not compete too hard."[8]

IN 1950 AS a result of fears that the merger movement was rapidly increasing monopoly power in American industry, the Celler-Kefauver amendment to the Clayton Antitrust Act was passed to prohibit mergers whose effect "may be to substantially lessen competition or tend to create a monopoly." While less of an immediate effect on competition was required when compared to the Sherman Act standard, the Congressional reports clearly indicate (1) that the goal was to protect competition rather than less efficient competitors and (2) that a "reasonable probability" rather than a mere possibility of injury to competition must be shown.[9] However, certain recent cases indicate that this act may be forged into one of the most sweeping anti-competitive devices in the hands of the Government.[10]

The Reynolds Metal Co., a producer of aluminum foil, was recently ordered by the Federal Trade Commission to divest itself of a recent acquisition, Arrow Brands, Inc., which converted aluminum foil into decorative foil for the florist trade. Although Arrow was a customer of Reynolds before and after the acquisition, the main complaint of the Commission was that after the merger Arrow had priced so low that competitors were badly hurt. When Reynolds responded that they had not initiated the price cut but had lowered their prices to meet foreign competition, the Commission bluntly stated the new philosophy:

> "Whether or not Arrow was actually the first to reduce prices was not too important. The significance in the situation is that Arrow could lower its prices and maintain them at low levels for an extended period which it could not have done before the merger. . . . In any event, we do not need to be particularly concerned with the justification Arrow may have had for reducing its prices below the cost of production. It is enough that the reductions show the exercise of a market power which Arrow achieved as a direct result of the acquisition."[11]

We leave to conjecture whether the Commission would recommend a protective tariff to fill the vacuum created by removing those firms which could meet foreign competition. Arrow's sin was what would, at one time, have been considered a virtue, its ability to compete more effectively. Though the Commission mentions pricing "below the cost of production," it hedges on whether Arrow did actually price below cost. Earlier the opinion admitted that "even if Arrow had not been selling below cost, it was selling at prices so near cost and so low that it virtually ran some of its competitors out of business."[12] In other words, even if after a merger the merged concern still makes a slight profit, should the lower prices "virtually run some of its competitors out of business," the merger injures "competition." This reasoning would apply whether the increased "power" results from greater efficiency or from greater financial "power."

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[8] *Atlantic Monthly*, Nov. 1961, p. 57.

[9] Cf. Milton Handler, "A Decade of Administration of the Celler-Kefauver Act," 61 *Columbia Law Review*, 629, April, 1961.

[10] A more complete account of the anti-competitive enforcement of this act is given by Robert Bork in 39 *Texas Law Review*, 711, June, 1961.

[11] Reynolds Metal Co., 1960 *Trade Reg. Rep.* ¶28,533, p. 37,256.

[12] *Ibid.*, p. 37,255.

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A recent decision by a hearing examiner, sent back for further findings of fact by the Commission, involves what is referred to as a conglomerate merger —a merger of two firms which neither are competitors nor do business with each other. Proctor & Gamble's acquisition of Clorox, a producer of liquid bleach, was found by the examiner to violate the Act.[13] Clorox's misdeed lay in being able to embark on a promotional campaign which allegedly succeeded at the expense of Clorox's competitors due to Proctor & Gamble's superior advertising and promotional experience and greater financial strength. Further, Proctor & Gamble, due to the large quantity of its advertising, received discounts unavailable to Clorox's competitors. This decision, if accepted by the Commission, would make explicit a completely new philosophy of antitrust. In previous cases, mergers were challenged because (1) by combining competitors they increased concentration in the market, (horizontal merger), or (2) by combining a buyer of a product with its seller, they "foreclose" competing sellers or buyers from a market (vertical merger). In the case of the conglomerate merger, the only grounds for objection must either be the increased financial ability to compete more effectively through advertising, price competition, or introduction of new techniques, or the economies of scale of management, mass advertising, etc. The former Chairman of the Commission has indicated that the Clorox case might lead the way to protection of small firms from the adverse effects of such mergers:

> "The acquisition by a large and powerful diversified company of a small company in a discrete industry historically shared by a number of small companies competing on equal terms followed by drastic competitive injury to the smaller competitors might be a demonstration of anti-competitive effect sufficient to satisfy the statutory requisites even if the acquisition was truly conglomerate."[14]

This philosophy, if accepted, could be used to freeze the structure of many American industries. When firms in a given industry are of a given size or structure, they would be kept that way if they could not generate the capital to introduce new cost saving techniques or the promotion necessary to expand the market. (This is especially likely at present, since a large percentage of equity capital is provided by large firms.) This can be compared to prohibiting a rich heir from buying a corner drugstore because by hard competition—advertising, new techniques—he could deprive competitors of a large part of their business, i.e., of a "fair opportunity to compete."

The Commission's endeavors have probably been surpassed by the recently replaced Robert Bicks of the Justice Department, who, you may recall, carried the torch of free competition in the price fixing case. An action has been brought against Von's Grocery Co. to disband its merger with Shopping Bag Food Stores. Together they comprise 8% of the grocery market in the Los Angeles area. At the time of the complaint there were twenty leading supermarket chains in the area; and experience indicates that competition, in the sense of lower prices, would be at least as great in such a market as in a market of small retailers, especially since entry is notably easy in the grocery business. But the complaint indicates that this is not what is meant by competition:

> "Independent retailers of groceries and related products may be deprived of a fair opportunity to compete with the combined resources of Von and Shopping Bag."[15]

[13] Proctor & Gamble, (FTC Dkt 6901), remanded for further findings, *CCH Trade Regulation Reports* ¶15,245 (June 15, 1961). The Commission found that the Examiner's facts were not sufficient to support his conclusions. For instance the Nielson rating showed that Clorox was expanding its sales faster before the merger. However, the language of the opinion seems to indicate that the Commission supported the theory of the Examiner as to the "anti-competitive" effects of a conglomerate merger.

[14] Earl W. Kintner, quoted in Adelman, "The Anti-Merger Act," 51 *American Economic Review*, part 2, 1961. p. 243.

[15] United States v. Von's Grocery Co., *CCH Trade Regulation Reports*, 45,060, p. 66,427.

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Mr. Bicks is more explicit as to what is undoubtedly the goal of the prosecution:

> "This complaint reflects our continuing concern over the effects on small independent grocers resulting from combinations of large supermarket chains."[16]

It is not claimed that the merger will deprive the other twenty chains of the "opportunity to compete," as it undoubtedly would not. It cannot be seriously argued that price competition among the chains would be appreciably lessened, that there is a "reasonable probability" that prices are likely to be higher as a result of a merger. The objection is that the achievement of efficiencies from combined resources would deprive less efficient forms of business of a "fair opportunity to compete." Again, it is not the consumer but the competitor who is being protected.

Mr. Bick's *magnum opus,* however, is the Brown Shoe case,[17] now pending before the Supreme Court, in which Justice Weber ordered the merger of the Brown Shoe Company and the G. R. Kinney Company ended. The shoe industry is notably competitive; and, according to the Court's own figures, after the merger the combined firms had only 5.5% of the manufacturing market and 5.7% of the retail market.[18] Since these figures are singularly unimpressive even in present antitrust cases, Justice Weber made some almost ludicrous assertions, belied by his own figures, that there was a sufficient trend toward concentration to warrant fear for the future of competition. But the crux of the argument is that dangerous efficiencies are driving small and less efficient retailers to the wall:

> "Company owned and company controlled retail stores have definite advantages in buying and credit; they have further advantages in advertising, insurance, inventory control and assists, and price control. These advantages result in lower prices or in higher quality for the same price, and the independent retailer can no longer compete in the low and medium price fields and has been driven to concentrate his business in the higher prices, higher quality type of shoes—and the higher the price, the smaller the market. He has been placed in this position, not by choice, but by necessity."[19]

> "It is the Court's conclusion that the merger would establish a manufacturer-retailer relation which would deprive all but the top firms in the industry of a fair opportunity to compete."[20]

Justice Weber has made explicit what other protectionists are often loathe to admit. Economies which permit lower prices are a danger, not a benefit, when they hurt less efficient producers. This is what is meant by "fair opportunity to compete."

These cases cannot be dismissed as isolated instances, since they represent the attitudes of the agencies charged with enforcing the antitrust laws. Lee Loevinger, now heading the Justice Department's Antitrust Division, has indicated that we can expect increased activity in the merger area, and this policy is even more ominous when coupled with the "backward sweep" doctrine developed by the Supreme Court. In the DuPont-General Motors case, DuPont was ordered to give up stock of General Motors it acquired over thirty-five years ago, though there was no claim that the acquisition was "anti-competitive" at the time. If this doctrine is literally applied, when coupled with the "competitive opportunity" doctrine developed in the above

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[16] *Ibid.*

[17] United States v. Brown Shoe Co., 179 *F. Supp.* 721 (ED Mo., 1959).

[18] Justice Weber has to juggle statistics even to get the 5.7%. He takes Brown-Kinney's total retail sales as compared with the total sales of the 22,000 retail outlets classified by the Census Department as shoe stores. 70,000 stores sell shoes, but the Census Department included only those which do over 50% of their business in shoes, excluding department stores. However, shoes sold by Brown-Kinney in department stores are included in its total.

[19] Brown Shoe Co., *op. cit.*, p. 738.

[20] *Ibid.*, p. 741.

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cases, the government could function as a regulatory bureau over any firm which has had a merger since 1950 and attack it when things seem to get rough for competition due to the success of the merged operation.[21]

ALLEGEDLY TO prevent "monopolistic" price discrimination, the antitrust laws have been turned against one of the strongest vehicles for bringing lower prices to consumers—the large buyers, especially the chain stores. Large retailers have unquestionably reduced prices by passing on a great part of the benefits of large-scale economies in lower prices and improved services, by operating at a low unit profit (although the total profits may be high), and by procuring lower prices from suppliers. Due to the ease of entry into retailing and the intense competition between these large buyers, this is generally a most unlikely area for monopoly extractions from consumers. Supporters of competition in this field even have the dubious aid of Ambassador Galbraith, who has emphasized the benefits of large scale retailing to the public.[22]

But when prices are lowered, someone is likely to be hurt, in this case the small and high cost retailers as well as many suppliers of merchandise. Aided by one of the most vigorous lobbies in the nation, they have partially succeeded in thwarting low price competition through "fair trade" and compulsory mark-up laws. In addition, they have succeeded to a large measure in preventing price concessions from suppliers, even when justified by cost savings to the supplier due to large purchases and service performed, through the Robinson-Patman Act and, even, the Sherman Act.

The Robinson-Patman Act is a mire of legal draftsmanship and defies a short description. But, while clouded in the usual language of "competition" and ostensibly designed to prevent price discrimination, the Act seems to have but one unifying principle: "to enforce discrimination against the lower cost buyer or the lower cost method of distribution."[23] The Act, together with its administration, has been noted for its disregard for any economic analysis of the price discrimination problem. Certain types of price discrimination which economists would class as most likely to be "monopolistic" and lead to higher prices are ignored by the Act, since no competitors are immediately injured, while discrimination which injures someone's business is almost consistently condemned, though such discrimination may in some cases be highly conducive to competition and lower prices.[24]

Several of the provisions, taken almost directly from NRA codes, make discrimination against buyers in some cases compulsory. A firm which performs its own brokerage cannot receive a discount for the amount the seller thus saves, and the seller cannot give discounts for other services performed by a buyer (such as advertising) or make services available to a buyer unless an offer is made to smaller customers on "proportionally equal terms," which is in many cases impossible.

The Act's main provision effectively prevents price discounts given to buyers which prove particularly annoying to competitors of these buyers. It prohibits discounts which "injure competition" with any competing buyer. It has generally been sufficient to show that complaining competitors have suffered losses because of the differential to prove injury to this "competition." This is true when large buyers, by cutting into the profits of wholesale sellers, have been able to pass part of these savings on to the consumer, substituting vigorous competition among large retailers for the previous small firm, high price retail structure. Though some courts have

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[21] This danger is developed at length by Bork, *op. cit., passim.*

[22] J. K. Gailbraith, *American Capitalism,* (1956). pp. 119-120.

[23] Adelman, "The Consistency of the Robinson-Patman Act," *Stanford Law Review,* Dec., 1953. p. 4

[24] Cf. Ferrall, "Quantity Discounts and Competition," 3 *Journal of Law and Economics* 146. Oct., 1960.

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used language to the contrary, the courts have generally substituted an "injury to competitors" for an "injury to competition" test.[25]

A price discount is exempt from the Act if it is equal to cost savings to the seller resulting from the size of the purchase or the method of delivery. However this has been so difficult to prove to the satisfaction of the Commission and the courts that the Act has effectively barred most discounts justified by cost savings. Discounts made in good faith to meet, but not undercut, the price of competitors, are also exempt. But the Commission recently held that this allows only "defensive" and not "aggressive" discounts, i.e., discounts cannot be made to meet the price of a competitor in order to win customers away from him.[26] As the dissenting Commissioner pointed out, this rule may effectively isolate suppliers in many markets from any price competition. The Commission has further held that a firm may not give a discount to meet the price of a competitor if consumer acceptance of its brand gives it an advantage.

In 1946 the biggest guns of antitrust were focused on a noted object of protectionist ire, the A&P, in a Sherman Act prosecution which is an epic in antitrust literature.[27] Even the judge convicting A&P proclaimed that "to buy, sell, and distribute to a substantial portion of 130 million people one and three-quarters billion dollars worth of food annually at a profit of 1¼ cents on each dollar is an achievement one may well be proud of." While selling less than 7% of the groceries in the nation, it had admittedly been a pioneer in introducing new techniques resulting in both lower prices and improved services to consumers. In the process, however, many had been hurt and were screaming loudly. There is legitimate disagreement as to just what the facts were and whether some action was warranted, but the government arguments and court decisions were landmarks in both economic confusion and protectionist sentiment. Only a few high points can be mentioned here.[28]

A&P was assailed for its policy of reducing prices so that volume of sales would eventually increase to a point where greater economies of scale would be realized and higher profits would be made. This practice would seem to lie at the very basis of competition, but to the government the notion of cutting prices to increase sales and realize economies seemed somehow un-American: "An honest retailer would attempt to price his merchandise in the traditional American way, that is, cost, plus expenses, plus a profit."[29] A&P's threat to manufacture its own products if its suppliers, often large ones, would not reduce their prices, was attacked as unfairly "coercive." A&P had performed its own brokerage, but it was forbidden by the Commission to receive discounts for the amount saved. It demanded allowances for its advertising and other services rendered its sellers, but these were attacked as giving A&P an "unfair advantage" without regard for the actual savings to suppliers in accepting these services. Though the action was

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[25] The Supreme Court indicated that it identified injury to competitors with injury to competition in FTC v. Morton Salt Co., 334 *US* 37, (1948): "[The Commission] heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices. Experts were offered to prove the tendency of injury from such prices. The evidence covers about two thousand pages, largely devoted to this single issue—injury to competition."

[26] Sunshine Biscuits, Inc., *CCH Trade Regulation Reporter*, ¶15,469 (Sept. 25, 1961).

[27] United States v. A&P, 67 *F. Supp.* 626, affirmed 173 *F2d* 79, (1949); and A&P v. FTC, 106 *F2d* 667. Representative Patman of Robinson-Patman fame unsuccessfully introduced a bill subjecting chain stores to a federal tax which would have imposed a $470,000,000 annual levy on A&P, creating a net loss of $390,000,000. Discriminatory taxes were placed on chains in 29 states, Wilcox, *op. cit.*, p. 372.

[28] For a detailed analysis, see Adelman, "The A&P Case" 63 *Quarterly Journal of Economics* 238, (1949). For the opposing opinion, see Dirlam and Kahn, *Fair Competition: The Law and Economics*, (Ithaca, 1954), pp. 233-241.

[29] From the Main Brief of the Government, quoted in Adelman, "The A&P Case," p. 241.

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brought under the Sherman Act with its market effect standard, the discounts received by A&P through hard bargaining were condemned without any attempt at showing that these policies were likely to injure rather than benefit buyers of groceries.

EVEN IF ONE agrees with the author that the antitrust laws have been perverted in recent years in certain areas, this, of course, does not demonstrate that they should be discarded. There is considerable honest dispute among economists as to what extent mergers resulting in increased concentration, price fixing and various other restrictive practices are likely to lead to higher prices and decreased output. Economists such as Stigler, J. M. Clark, and Machlup, to name a few, have advocated strong enforcement of the laws. Others, including Hayek, Mises, and Schumpeter, have been skeptical about the value of such action, especially as to the desirability of breaking up concentration. Machlup and others have suggested more may be accomplished by elimination or modification of patent law, tariffs, and other government policies which encourage concentration. But it is to be hoped that in the future the controversy over antitrust questions returns to this area and that the present anti-competitive tangent can be abandoned.

The present trend, however, might be destined to predominate in the years ahead, since it may well represent an attitude closer to the hearts of Americans than lip service paid to "free enterprise." (This is well illustrated by many "right wing" businessmen when their profits are threatened by competition.) The author suggests that the most likely statist trend in this country would not be toward "socialism," the present bogey of the right wing, but rather toward an indigenous hybrid of feudalism and economic fascism. In the extreme form of this type of social organization, each businessman would be guaranteed his margin of profit, just as each worker would be guaranteed his wage and each farmer his income, sheltered against the forces which have made for a progressive, consumer oriented economy, with its painful adjustments for the marginal producer. The last few centuries have been viewed as dramatically displaying a movement away from such a society with its frozen relations toward a society characterized by mobility, freedom, and progress. This movement received Sir Henry Maine's famous characterization as the movement from "status" to "contract." Present popular attitudes as well as government policies may well indicate a reaction—from contract back to status.

While such a trend is to be noted not only in a wide area of governmental policy but also in private business and in labor relations, it can be seen in its purest form in the discussion of farm policy. Here the espousal of "just price" and the right of a farmer and his son (ad infinitum) to a "fair" return on their plot of land regardless of the greater efficiency of larger units and the conditions of demand, remarkably parallels the medieval attitude toward competition. We are asked to determine an intrinsic value of the farmer's performance separate from the market value of his production, and guarantee him a corresponding income.[30]

To those who accept this philosophy I can only suggest that they shed their hypocritical wrath directed at private price fixers. The philosophical arguments in support of such a position can certainly claim intellectual respectability. And I cannot deny the possibility that a government supervised static society, or one tending more in that direction, might, by more successfully satisfying urges for security and tranquility, provide greater "contentment" of a sort to the bulk of its members.

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[30] "This nation owes to its farmers—not a fair income or a guaranteed income—but it owes to them conditions under which they have an opportunity to earn that kind of an income to which their industry and ability entitles them. This is the only answer that is consistent with our American ideals." Orville Freeman, *World*, Jan. 3, 1962, p. 17. If the reader can comprehend this distinction, please enlighten the author.

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But to those who consider this sort of contentment repulsive and who prefer the values, material and otherwise, which are maximized in a free society, I urge that our present policies be carefully re-examined. It is a corollary to this position, although to some an uncomfortable one, that if the forces of competition are to have their desired effect, they will alter the structure of industries. And twenty similar sized firms in a market may be much more competitive than the two hundred previously existing in the market, notwithstanding the torturous demise of the firms not suited to remain. Once the distinction between preserving competition and protecting competitors is made clear, we can return to a fruitful debate on the policies most suited to maintain competition.

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* Since this article was written the Justice Department has indicated that it will drop its demand for a rule against "unreasonably low prices" in the decree against GE. It is likely to do likewise with the other defendants.

With our last issue (November 1961) the single copy price of NEW INDIVIDUALIST REVIEW was raised from 25c to 35c. Our subscription rate, however, has remained the same. This increase was made necessary by our expanding from 32 to 40 pages.

With this issue, NEW INDIVIDUALIST REVIEW will become a quarterly; an issue of at least 40 pages will be published every three months. (We hope to be able to further increase the number of pages as soon as possible.)

Readers who enter their subscriptions prior to February 28, 1962 will receive five issues. Those who subscribe after that date will receive four issues a year at the original rate of $2.00 a year for non-students and $1.00 a year for students.

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Reflections in Berlin

RALPH RAICO

THOSE AMERICANS WHO belong to the sophisticated academic circles which continue, in their hearts, to look on Communism as largely a myth invented by the John Birch Society ought to take a trip to Berlin. Here they will be able to ascertain for themselves that Communism does, indeed, exist. Hardly more perceptiveness will be required to see besides that, as a system having a claim on the sympathies of men who do not care to profit, economically or emotionally, from the servitude of others, Communism has ended in final, utter bankruptcy, a state of affairs symbolized by the wall which Ulbricht caused to be erected on August 13th of last year.

This is not to say that there was not every reason to condemn Communism before then. There were some men, stubbornly faithful to the reality-principle, who had not ceased to attack this form of totalitarianism from the very first year of the Bolshevik Revolution, when Lenin and Trotsky formed the Cheka and suppressed the Constituent Assembly, and the existence of such men is an unanswerable reproach to those others, less respectful of the facts which began emerging from Russia at a very early date, who were friendly to the Soviet regime in the 1920's, '30's, and '40's. The Berlin Uprising of 1953 and the Hungarian Revolution three years later should have made the issue quite clear in the minds of all men of good will; it is not mere partisanship which may lead one to suspect the motives of a person who continues to support Soviet Communism after what happened in Budapest. But if anything *was* needed after Hungary, the events in Berlin last year have provided it. For here was realized what might have occurred to a mediocre author to put into an improbably sensationalistic novel on Communism: people were fleeing the Communist regime in such numbers that it was at last compelled *to build a wall* to keep them in!

We must, I think, agree with von Mises, who himself asserts, somewhere in his *Socialism*, that there is something grandiose about the socialist idea. This is especially true of the sub-species of socialism which is Communism. For the best and most enlightened spirits with full consciousness to, so to speak, lift their society out of history; to put an end, once and for all, to all the inherited superstitions and institutionalized abuses which "weigh like a nightmare on the brains of the living" and torture each generation anew — who can fail to be moved by the vision? And if one must employ means which even the old reactionaries—the Bourbons, the Romanoffs and the Hohenzollerns—would have found unacceptable? In that event—altogether probable, considering the scope of the changes aimed at—one can answer with the last words of Schiller's *Maid of Orleans*: "The pain lasts but a little while; the joy is eternal."[1]

Now, however, one can be excused for regarding the question as closed. A

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[1] "Kurz ist der Schmerz und ewig ist die Freude."

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graphic comment on the above reasoning is provided by a photograph a reporter was clever enough to take, which may be seen at Amerika Haus, in West Berlin. It was snapped near the wall, and shows the office-building of a Communist newspaper, just over the boundary. The picture is taken at such an angle that the name of the newspaper, in big block letters on the side of the building, is framed by the barbed wire on top of the wall. The newspaper is—*Neue Zeit* ("New Age"). Those who, after the 13th of August, are looking for a more final condemnation of Communism can only justify their indecision by pointing to the fact that, after all, the Lord Himself has not yet come down from heaven to speak His judgment.

If you walk along Bernauer Strasse, which forms part of the boundary between the West and East Sectors, you will be able to see the nature of the threat to which the Communists responded by building their wall. Along this street there are four markers with wreaths, indicating the spots where people died, going to the extreme of jumping from the adjacent buildings in their attempt to escape to the West. One of the markers is for a German student who had been pursued across the rooftops by the Vopos (*Volkspolizisten* — "People's Police"). It sounds hackneyed, but only because the facts are so outrageously obvious: one can only think, *"This* badly do people want to leave a Communist country!" A sad little joke which is told in the East Sector asks, "What would you do if tomorrow the wall were dismantled?" The answer is, "I'd climb the nearest tree—I don't want to get trampled to death in the stampede to get out!"

What the people want to leave behind is not difficult to understand. To deal with the economic sphere first, Ulbricht's regime is in this regard a fiasco popularly and appropriately symbolized by the seven-year-old buildings on the fashionable Stalin Allee (now Karl Marx Allee) from the facades of which the tiles started a few years ago to fall off in clusters. There are continual shortages of some important food-items or others. Recently it was potatoes (!) which were in short supply; currently, fruit is almost impossible to obtain. One can, it seems, buy all the *Wurst* one wants; any better meat is scarce and expensive. (A West Berliner told me how once tears came to the eyes of his relatives from the East Sector, as they looked on the abundance which can be found in any neighborhood grocery in the West Sector!) Clothing is expensive and decidedly inferior to any West European goods. Shoes are said simply not to be made to be walked in for a whole day. The Communist regime seems to be most negligent of all in regard to the little "luxuries" taken for granted everywhere in the West: cigarettes are expensive and tasteless; almonds and raisins for the traditional Christmas cakes were rarely to be had this year.

The Communist regime is well aware of its failure to provide its people with anything approximating the standard of living which has now become a matter of course in Western Europe, and it tries as best it can to cover up this failure. Sometimes it succeeds. I remember reading an account in the *Herald Tribune* by a reporter who visited the Leipzig Fair last year, and concluded that conditions in East Germany were not as bad as some maintain: he could see for himself that the people were living better than before. That this reporter could so unthinkingly accept at face value what he saw, testifies to an astounding naivete'. In Berlin I learned from a Saxon student who had fled to the West that the sudden manipulated annual rise in the living-standard of the Leipzigers at fair-time has become a standing source of humor in East Germany. According to one joke, the Leipzigers are the most pious people in Germany—they fast from *Messe* to *Messe*.[2]

The absence of political and intellectual freedom provides another important reason for the flight from the East Zone. The new "Socialist Legality" has either not been applied or not been of much use, if there is anything typical in the case (told me by a young lady in

[2] *Messe* meaning both "mass" and "fast."

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West Berlin and a relative of the man in question) of the Saxon who drank a bit too much at a Christmas celebration last year, began criticizing Ulbricht, and, as a consequence of the industry of an ever-alert Party member who was present, has been sentenced to five years in prison.

Most depressing of all, I found, was the climate of constant official *lying* under which people in the East must live.[3] They are, for instance, expected to believe, against their own personal knowledge, that those who fled to the West only went because they were kidnapped or bribed. In the East Sector, I saw, as another example, a sign with a statement by Ulbricht to the effect that the wall was built chiefly because an invasion by the Western powers was a real possibility. (As if, even if NATO *were* to invade East Germany, the invasion would come from isolated West Berlin!)

The almost eerie atmosphere of dishonesty is intensified by the existence, besides such explicit lies, of what might be termed "implicit," "institutionalized" lies. To this category belongs, for example, the continued maintenance of "other parties." On a walk in the East Sector, I was startled to see a neon sign across the top of a building: "Christlich-Demokratische Union" (Christian-Democratic Union)—Adenauer's party! Under this, however, was a placard the length of the building: "With the Peace Treaty for Peace and Unity of the Nation. With Socialism for the Happiness of the People." If the Communists really expect people to be impressed by such merely paper-organizations, with empty names standing for various political parties, they are reckless speculators indeed in the gullibility of man.

In the category of implicit lies must also be counted the re-naming of the old University of Berlin "Humboldt University." The use of the name of the greatest German theoretician of liberty by such a regime and for such an institution, seems to me to display almost as delicious a sense of irony as that which caused the Nazis to set above the gate at Auschwitz the motto, *Arbeit macht frei* ("Work makes one free").

A Communist-written history of "Humboldt University" states that, under the German Communist regime, the institution has "made a new start in the spirit of Humboldt." How much of this spirit exists in East Berlin may be gathered by a tour of the major book-stores, including those at the university. As observers have remarked before, they contain essentially only "Marx and technology." Of the large spirit of liberal education there is not a trace. We can take as an example the philosophy section of these shops. Besides being unusually small, they offered virtually only Marxist works. I noticed, for instance, that there were no works at all of Nietzsche or Schopenhauer. A sales-girl told me, "They are no longer published in Germany." Works of Kant were available, presumably because Engels somewhere mentions him and Fichte as "the great predecessors of Hegel and Marx." (If only Lenin had made a casual—uninformed but favorable—reference to Nietzsche in some letter!) Existentialism and modern positivism were represented only by Marxist critiques of these philosophers. The choice under the heading "Social Science" was even more limited: in the land of Max Weber and Wilhelm Dilthey, a sociology student must evidently be satisfied with the works of Walther Ulbricht and Ho Chi Minh. So much for the Communist method of realizing the spirit of Humboldt!

The suppression of intellectual freedom has, it would seem, become more, rather than less, pronounced in recent years. This, at least, is what is indicated by the statement published by Ernst Bloch, who, along with Peter Palitzsch (a well-known theater-director, said to have been Brecht's favorite pupil) was one of the East German intellectuals who broke with the regime after August 13th. The case of Bloch is an especially interesting one. One of the most prominent Marxist philosophers in Europe, Bloch had resided in

[3] This has, of course, frequently been noted and discussed by writers on Communism. For the case of Hungary, for instance, see George Mikes, *The Hungarian Revolution* (London, 1957).

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the United States until 1949, when he went to the University of Leipzig to direct the *Institut fuer Philosophie*, having previously declined an offer by the (West German) University of Frankfurt-am-Main by remarking that he did not intend to become a servant of capitalism. In 1954, at the Second Congress of the National-Front, he asserted: "The peace speeches of Dulles and Adenauer only help along the war which they are planning." He was already living in the Bundesrepublik when the setting up of the wall led him to break with the East German Communists. In a letter to the (East) German Academy of Sciences, Bloch writes:

> In the first years of my connection with the University, I enjoyed unhindered freedom of speech, of writing and of teaching. In recent years this situation has increasingly changed. I was driven into isolation, was given no opportunity to teach, had my contact with students interrupted. My best students were persecuted and penalized, the possibility of published work was denied me, I was not able to publish in any periodical, and the *Aufbau* Press in Berlin did not fulfill its contractual obligations in regard to my work. . . . In contrast to this, universities, periodicals and my publisher in West Germany for a long time have given me an opportunity to publish and to continue unmolested the work I have done up until now. . . . At 76 years of age, I have decided not to return to Leipzig.[4]

In spite of all this, however, there are a number of important German intellectuals still loyal to Ulbricht's regime. To these, two West German publicists, W. Schnurre and G. Grass, addressed an open letter on August 16th of last year, calling on them to denounce the erection of the wall. I do not think that much could really have been expected from these people. The novelist Anna Seghers, for instance, who is President of the (East) German Writers' League, and who was one of the persons addressed, had remarked at the time of the purge-trials under Stalin, when she was already a Communist, "I have succeeded in forbidding myself to reflect about that sort of thing."[5] As it turned out, the replies of the Communist writers who chose to respond[6] are in a way interesting. All of them passionately defended the action of "their government." They spoke of "West German militarism," "American imperialism," "the hangman-society" prevailing in the West (!), the necessity of changing the nature of man. The wall, according to the Communist composer Paul Dessau, represented a desire on the part of "the people of our republic to draw a thick line of demarcation between fascist degeneration and socialist construction." A person said to be a historian attached to the Central Committee of the SED (East German Communist Party) wrote, of West German agents in West Berlin, "They have blackmailed citizens of the German Democratic Republic into becoming secret agents, abducted children from their parents, driven young men to the Foreign Legion and young women to the white slave trade." (No proofs are offered, no sources cited.) The Presidium of the German Writers' League replied that, "The first space flights show us what man is capable of when he shakes off the burden of imperialism and its wars."[7] Not one of them in their defenses even once mentioned the fact that refugees had been streaming out of the East Zone in tens of thousands, or that this was the reason for the action of August 13th. Apparently, like Frau Seghers,

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[4] Bloch's statement is reprinted in full in *Die Mauer, oder Der 13. August*, edited by Hans Werner Richter (Hamburg, 1961), pp. 140-141. Because of Bloch's change of camps, there has been a tendency among some writers to consider him a "hero," and to hint that now we in the West may begin to feel the discomfort of having such an "outspoken and fearless heretic" in our midst. It should be kept in mind that, as his letter makes quite clear, Bloch only left East Germany because he was personally beginning to have difficulties in freely expressing himself. In good left-Marxist form, he had never been much troubled by the Communist suppression of his philosophical opponents.

[5] Quoted by Walter Karsch, in *ibid.*, p. 106.

[6] As reprinted in *ibid.*, pp. 66-90.

[7] Do Newton and Einstein prove then "what man is capable of under capitalism"? Fortunately for these Communist intellectuals, they are assured that none of their colleagues will rise to point out the blunder.

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these intellectuals had "successfully forbidden themselves to reflect about such things."

The position of the East German intellectuals is not an attractive one. After life-times spent in the service of a cause they at least at one time probably considered synomous with the freedom and well-being of the masses, they are now cruelly condemned to witness the results of their years of endeavoring.

Originally, as I have indicated before, it was thought that suppression of freedom of the press, abolition of academic freedom, and the dismantling of most of the rest of the legally-protected sphere of individual autonomy were justified, because, in spite of the pain caused to one or two generations, only in this way could a society at last be created where the great masses could live decently. But those who uncritically gave in to the hope that someday, somehow it would turn out this way must face the fact that the "Workers' and Peasants' State" of the Soviet Zone has proved itself utterly incapable of matching the achievements of free enterprise in the Bundesrepublik. What is left *now* as a rationale for dictatorship? That in one or two generations — or in one or two centuries — life will be better in the East than in the West? What reasonable grounds could anyone have for supposing this? And as the Communist intellectual searches for some reason, hidden in the recesses of the holy books of Marxism-Leninism, he is alone with the thought: an unarmed man was shot to death by the Vopos, as he attempted to swim across the Teltow Kanal into the West. As one French journalist wrote, addressing his Communist compatriots shortly after the erection of the wall: "Confess it: what weighs down on your minds, what makes you fear for the future, is that the Revolution and liberty have changed camps; is that you are for the jail-keepers and the hangmen, and that men everywhere are beginning to perceive it."[8]

Sad as is the personal case of these writers, however, we ought never to forget the great responsibility which, as intellectuals, they bore, and which they have acquitted quite poorly indeed. What I mean is this: the French worker who supports Communism in the vague belief that they will reduce the price of his daily bottle of wine, betrays nothing; he literally "knows not what he does." More rectitude was perhaps not to be expected from the Vopo who today murders an unarmed man fleeing to freedom: twenty-five years ago, this same Vopo would have marched with the SA and beaten old Jews in the street. That is the nature of the animal. But if the intellectuals themselves permit freedom to be destroyed—including the right to emigrate and the right to read Nietzsche—who will there be to defend it? Our French worker, or this Vopo? Freedom, especially intellectual freedom, is the immediate, urgent business of a very few people in the world. Although in the long-run freedom benefits all, almost everyone is prepared to jeer at concern with it as "ivory-tower," and to infringe it at the slightest supposed inconvenience to other interests. It is the duty of the intellectual, who should be more far-seeing than others and less liable to the shoddy emotions which are used to drown all regard for it, to guard freedom. This duty Communist intellectuals, particularly, have shamelessly betrayed.

It is, of course, difficult to defend uncompromisingly the abstract moral law against the pretexts employed by the existing powers in the world to justify their crimes; to be as uncompromising in this regard as, say, Acton was in the last century, or, to choose a contemporary American writer, as Dwight MacDonald has had the merit of being. Most intellectuals do not have the fortitude to bear the tensions such a position entails. How much easier to indulge the dream that someday "history will absolve us,"[9] to

[8] Henri A. Sabarthez, in *Rivarol*, August 24, 1961.

[9] *History Will Absolve Me* is the characteristic title of a collection of writings of Fidel Castro on sale at some American college book-stores a few months ago. Compare, from a Nazi "Folk-Book": "And even if they condemn us a thousand times over, the goddess of the eternal court of History will smile, tear up the accusation of the prosecution and the judgment of their court, for she acquits us . . ." Quoted in *Das Dritte Reich: Ansprung und Wirklichkeit*, by Hermann Glaser (Freiburg, 1961).

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submit one's self to some Cause, especially one having something as grand as the Red Army, or the Awakening Nations (or the United States Air Force!) behind it, and, in a sort of moral Popular Front, to refrain from criticizing the wrongs committed in the name of this Cause. If one is fortunate enough to be able to summon the self-discipline which the Masters call for, then perhaps one can even "successfully forbid one's self to reflect" on such wrongs.

This has been the sad, sad treason of the intellectuals for decades now. It has contributed to the enslavement of the East Germans. As a look around in America today shows, it is still at work, leading intellectuals to applaud the enslavement of the Cubans, to excuse even that of the Chinese, to apologize for any immorality Power chooses to commit anywhere in the world in the name of "the masses."

For whose future enslavement, I wonder, is it even now preparing the way?

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During the past year, the circulation and staff of NEW INDIVIDUALIST REVIEW has been expanding rapidly. This journal is now being sold at many local newsstands and at over 40 colleges and universities. Despite a few dissenting notes, the general reaction of libertarian and conservative leaders has been favorable. The author of "The Conservative Mind," Prof. Russell Kirk, for instance, has said that NEW INDIVIDUALIST REVIEW is a work of "genuine intellectual power" and the editor of "National Review," William F. Buckley, Jr. has called it "by far the best student magazine on our side of the fence." If you agree that this is a useful magazine which ought to be read by more people, there are four things that you can do to further the growth of libertarian-conservative ideas.

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David Hume:

Whig or Tory?

EUGENE MILLER

DOES DAVID HUME, the leading English philosopher of the eighteenth century, deserve a place among those great political theorists of the past who valued individual liberty? This question has been debated since Hume's own century. Interpreters who deny such a place to Hume have viewed him as a Tory, rather than a Whig in the tradition of John Locke, and have insisted that he favored authority and monarchy, not liberty and free government. Russell Kirk echoes this view by describing him as an "ardent High Tory," who "stood for the Old Cause against Whiggery."[1] An opposing interpretation of Hume's political theory has come from such writers as F. A. Hayek, who emphasize Hume's influence on Adam Smith and classical liberalism. Hayek, who chooses Hume as a "constant companion and sage guide" throughout the pages of *The Constitution of Liberty,* places him in the "Old Whig" political tradition rather than in the Tory or conservative tradition.

The dominant interpretation of Hume's political philosophy places him in the Tory camp. The English Whigs writing during Hume's lifetime charged that his *History of England* and political essays favored absolute monarchy and the Tory cause, and Thomas Jefferson branded him "the great apostle of Toryism" and claimed that his writings, along with Blackstone's, "have done more toward the suppression of the liberties of man, than all the millions of men in arms of Bonaparte."[2] In Jefferson's eyes, Hume was guilty of rejecting popular government, or government based on consent, and of defending the monarchy of the Stuarts. For this purpose, writes Jefferson, Hume

> suppressed truths, advanced falsehoods, forged authorities, and falsified records. . . . But so bewitching was his style and manner, that his readers were unwilling to doubt anything, swallowed everything, and all England became Tories by the magic of his art. His pen revolutionized the public sentiment of that country more completely than the standing armies could ever have done, which were so much dreaded and deprecated by the patriots of that day. . . . Hume, with Brodie, should be the last histories of England to be read. If first read, Hume makes an English Tory, from whence it is an easy step to American Toryism.[3]

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[1] See Kirk's introduction to Hume's *Enquiry Concerning Human Understanding* (Chicago: Henry Regnery Co., 1956), p. vi.

[2] Quoted by Vernon L. Parrington, *Main Currents in American Thought* (New York: Harvest Paperbacks, 1954), I. p. 358.

[3] In *The Complete Jefferson,* ed., Saul K. Padover (New York: Duell, Sloan & Pearce, 1943), p. 1095.

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It is noteworthy that Jefferson believed Hume, rather than Burke, had been responsible for the growth of conservative sentiment in England during the late eighteenth century.

Recent findings concerning Hume's political theory, however, contradict the widely accepted notion that he was a Tory, and tend to support Hayek's belief that he was, in fact, an advocate of free government and individual liberty.

Ernest Campbell Mossner, Hume's biographer, has rejected the charge of Jefferson and others that Hume was a "Tory historian." According to Mossner, Hume was a sceptic who repudiated the dogmas of both the Whig and Tory *parties* of his time. Mossner does believe that Hume's political theory contains ideas in common with both the Whig and Tory *traditions*, which developed in the nineteenth century, and describes Hume as "a Liberal in the large, non-party (and, historically speaking, nineteenth-century) sense." Nevertheless he finds that Hume's political theory is "colored by a cautionary skepticism concerning the likelihood of continuous human progress that belongs to what may with equal justice be called the large, non-party, Conservative tradition."[4]

The belief that Hume opposed popular government has been undermined by the recent findings of Douglass Adair, who is recognized as an authority on *The Federalist*.[5] Adair seems to have been the first scholar to show that Hume's political essays served as a main source for James Madison's conception of republican government. In *The Constitution of Liberty*, Hayek places Hume and Madison in the same political tradition, but he does not suggest that the English philosopher might have directly influenced "the father of the Constitution." Adair shows that Hume's writings helped to transmit this political tradition to Madison.

While recent evidence discredits the opinion that Hume was simply a spokesman for the Tory cause, it does not justify the conclusion that he must therefore have been a Whig. The fact remains that Hume often ridiculed the Whig party and Whig beliefs. The practice of viewing Hume in terms of the Whig-Tory dichotomy rests on the dubious assumption that he can best be understood as a member of an eighteenth-century political party or a nineteenth-century political tradition. By the same token, it is not very helpful to ask whether Hume was a "conservative," a "liberal," or an 'individualist." These vague concepts came into use after Hume's time and have little meaning when applied to his thought.

How is Hume to be understood, if not as a Whig or a Tory? Hume provided an important clue to the proper interpretation of his political writings by referring to himself as a "philosopher." As he pointed out, a philosopher looks at political problems differently than a spokesman for a political party. The political philosopher poses such general questions as the nature of the best form of government or the proper goals of political life, and his thinking about specific issues is guided by general principles. Hume's interpreters have tended to focus on his specific statements about politics, which are often contradictory and obscure, without seeking the general principles which underly them.

The debate as to whether Hume was a Whig or a Tory must be settled in light of his over-all political philosophy. But no comprehensive account of that political philosophy has yet been offered. He has been virtually ignored by historians of political thought. His failure to write a systematic treatise on politics

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[4] "Was Hume a Tory Historian?", *Journal of the History of Ideas*, II (April, 1941), pp. 235-36.

[5] Douglass Adair, "That Politics May Be Reduced to a Science. David Hume, James Madison, and the Tenth Federalist," *Huntington Library Quarterly*, XX (August, 1957), pp. 343-360. Gottfried Dietze, in *The Federalist* (Baltimore: The Johns Hopkins Press, 1960), cites Adair's findings in support of his own conclusion that "even before independence, there had existed complete accord between Hume and the colonists on the subject of liberty" (p. 316). Hume's influence on other founders such as Hamilton, and his sympathy for the American cause has long been recognized. The "neo-Burkeans" often refer to Burke's influence on American thought. Hume's influence has probably been far greater than Burke's, at least until the present generation of Americans.

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has undoubtedly hindered the interpretation of his political theory. His brief political essays often appear contradictory, and it is difficult to formulate a unified view of political life from them.

While a full account of Hume's political philosophy is beyond the scope of a single article, some suggestions are possible as to its main features and their bearing on such issues as the Whig-Tory question, Hume's attitude toward individual liberty, and his place in the history of political theory. Mossner and Adair have provided suggestions for such an undertaking. Mossner has pointed out that Hume was sceptical of the dogmas of the Whig and Tory parties as well as of the notion of continuous human progress. Adair has called attention to Hume's emphasis on the dangers from political factions — an emphasis that is carried over into Madison's writings. These dangers may be said to have provided a starting-point for Hume's political philosophy. Adair goes on to show the importance of Hume's neglected essay on the "Idea of a Perfect Commonwealth" in shaping Madison's thought. This essay, which is crucial for a proper understanding of Hume's conception of the nature and tasks of political philosophy, indicates the purpose of his political writings.

THE DISPUTE as to whether Hume was a Whig or Tory must be settled in terms of his teachings about political factions. Hume regarded the Whigs and Tories as the leading English parties or factions of his time, and he traced their origin to the political struggles of the seventeenth century. For Madison, whose position in this area was greatly influenced by Hume's essays, factions arising from a common interest or passion are especially dangerous to the stability of popular government. He gave only passing notice, however, to a type of faction which Hume saw as particularly dangerous, i.e., "parties from principle."

Hume writes that "parties from principle, especially abstract speculative principle, are perhaps, the most extraordinary and unaccountable phenomenon that has yet appeared in human affairs."[6] As this passage shows, Hume anticipated the "age of ideology," in which bitter conflicts between opposing systems of ideas would predominate over moderate conflicts arising from opposed interests. Why had political and religious disputes become more bitter in modern times? Hume placed the blame on modern philosophers and theologians, who had allowed their speculative principles to become involved in factional disputes.

Hume viewed the Whigs and Tories as factions from principle. He observed that

> as no party, in the present age, can well support itself without a philosophical or speculative system of principles annexed to its political or practical one, we accordingly find that each of the factions into which this nation is divided has reared up a fabric of the former kind in order to protect and cover that scheme of actions which it pursues.[7]

Underlying the Tory defense of monarchy is the principle that "the Deity is the ultimate author of all government." The Whigs trace government to an "original contract" and conclude that all just or legitimate government rests on the consent of the governed. Each faction insists on the absolute validity of its principle.

Hume's treatment of factions must be understood in terms of his frequent distinction between "philosophers" and "the vulgar." Factions arise among "the people" or "the vulgar," and "the people [are] commonly very rude builders, especially in this speculative way."[8] Just as the philosopher's knowledge transcends ordinary opinions, so is the philosopher above factions. Hume insists that to speak of "philosophers who have embraced a party" or faction is "a contradiction in terms."[9] To ask whether Hume was a Whig or a Tory, therefore, is to

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[6] David Hume, *Essays Moral, Political, and Literary*, ed., T. H. Green and T. H. Grose (London: Longmans, Green, and Co., 1882), I, p. 130.

[7] *Ibid.*, p. 443.

[8] *Ibid.*

[9] *Ibid.*, p. 446.

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miss the crucial point about his political philosophy. Whatever Hume says about the Whigs or the Tories is said not as a partisan but as a philosopher.

Hume did not conceive of the philosopher as merely a theorist, who lives apart from public affairs. While the philosopher is "above" factions, he is not indifferent to them. Hume believed that the philosopher is capable of performing certain political tasks for which ordinary citizens and even statesmen are unfitted. One of these tasks is to promote political stability by mediating between opposing factions to assuage the force of their disputes. The danger of factions provided a starting-point for Hume's political philosophy because he saw the philosopher as the citizen best fitted to mediate between competing factions, especially factions from principle. Hume's understanding of the task of the philosopher with respect to factions is stated concisely in his essay "Of the Protestant Succession":

> It belongs, therefore, to a philosopher alone, who is of neither party, to put all the circumstances in the scale, and assign to each of them its proper poise and influence. . . . If he indulges any passion, it is that of derision against the ignorant multitude, who are always clamorous and dogmatical, even in the nicest questions, of which, from want of temper, perhaps still more than of understanding, they are altogether unfit judges. . . . The following reflections will, I hope, show the temper, if not the understanding of a philosopher.[10]

Unless we understand this conception of the duty of the philosopher with respect to factions—and Hume does not allow us to forget that he is a philosopher—then we shall be unable to understand those writings in which he treats the English factions and their principles.

"Of the Original Contract" is probably the most important of the essays in which Hume discusses the principles of the two parties. He states the Tory doctrine of divine right in a brief passage at the beginning of this essay, but he does not explicitly criticize it. The remainder of this rather long essay is devoted to a vigorous and sarcastic attack on the Whig notions of an "original contract" and government by consent. The style and emphasis of this essay might well give rise to the belief that he was sympathetic to the Tory and entirely opposed to the Whig principle. He ridicules the Whig "speculative system of politics" and claims that their "original contract" doctrine can make men "so much in love with a philosophical origin to government as to imagine all others monstrous and irregular."[11] He insists throughout this essay that the Whig principle is opposed to common sense and political stability: "Were you to preach, in most parts of the world, that political connections are founded altogether on voluntary consent or a mutual promise, the magistrate would soon imprison you as seditious for loosening the ties of obedience, if your friends did not before shut you up as delirious for advancing such absurdities."[12]

The passages in this essay that caution against violent innovations, a theoretical approach to politics, and a lack of respect for ancient ways are likely to remind the reader of some of Burke's statements.

It would be erroneous, however, to conclude from the most obtrusive statements in Hume's essays that he was simply a partisan of the Tories. As we shall see, his "perfect commonwealth," which provides for the annual election of all officials, is based on an extreme application of the doctrine of consent. The addition of a significant paragraph to the later editions of "Of the Original Contract" makes clear his intention:

> My intention here is not to exclude the consent of the people from being one just foundation of government. Where it has place, it is surely the best and most sacred of any. I only contend that it has very seldom had place in any degree, and never almost in its full extent, and that, therefore, some other foundation of government must also be admitted.[13]

Yet if Hume could agree with the Whigs that consent is the best and most

[10] *Ibid.*, pp. 474-75.

[11] *Ibid.*, pp. 448-49.

[12] *Ibid.*, p. 447.

[13] *Ibid.*, p. 450.

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sacred basis of government, why would he ridicule and discredit the Whig principle, thereby provoking the suspicion that he was a Tory? The answer is to be found in Hume's conception of the practical tasks posed for the philosopher by factional disputes.

Hume states that one of his purposes in "Of the Original Contract" is "to encourage moderate opinions." It was to serve this purpose that Hume discredited in the minds of his readers those potentially dangerous political principles urged zealously by the Whig faction. In his attack on the Whigs and his silence concerning the Tories, Hume was guided primarily by practical rather than theoretical considerations. His intention was to say something beneficial, which is not necessarily something true. To consider principles with regard to their social effects is not the same as considering them with regard to their truth. Hume saw as clearly as Burke that a principle can be theoretically true and yet practically harmful.

At least part of the difficulty of interpreting Hume's writings can be explained by his recognition of the difference between true principles and beneficial opinions. The Whig principle of consent as the basis for just government was, from Hume's viewpoint, not so much philosophically false as practically dangerous. If Hume's purpose in writing his essays had been simply theoretical, then his sceptical philosophy would have provided him with far more reason to attack the Tory divine-right doctrine than the principle of consent.

Hume would have granted that in the past the divine-right doctrine had been used to justify political and religious oppression. By his time, however, there was no longer any likelihood that it would become a widely accepted and politically dangerous doctrine. Hume would appear to have foreseen an increasing acceptance and radicalization of Whig principles, and his attack was aimed more at the propaganda of intemperate Whig spokesmen than at the Lockean principle of consent.

It may seem strange to the modern mind that Hume would have thought it necessary to discredit noble principles or to teach opinions which are not simply true. Interpreters in the tradition of Jefferson would no doubt say that such actions reveal Hume's low opinion of human capacities, but Hume would undoubtedly reply that such critics show a lack of discrimination in failing to distinguish between philosophic men and ordinary citizens. Most citizens are guided by opinions, and what is philosophically true might be a very dangerous political opinion.

Thus Hume opposes the Enlightenment belief that all political problems can be solved by making true principles accessible to all men. In a letter to Turgot, Hume politely objects to the French economist's "agreeable and laudable, if not too sanguine hope, that human society is capable of perpetual progress towards perfection, that the increase of knowledge will still prove favorable to good government, and that since the discovery of printing we need no longer dread the usual returns of barbarism and ignorance. Pray, do not the late events in this country appear a little contrary to your system?"[14] Hume's own view is akin to the classical belief that political society must rest on "noble lies." Madison appears to agree to this when he refers in the forty-ninth *Federalist* to the proposition that "all governments rest on opinion."

In addition to attacking the opinions that he regarded as politically dangerous, Hume indicated which opinions are beneficial for citizens and should be protected. He holds that the political order stands or falls on the uncritical acceptance by most citizens of the belief that the existing laws and institutions are good simply because they are ancient and tested.

In the very essay in which Hume sets forth his "perfect commonwealth," he cautions that "the bulk of mankind [is] governed by authority, not reason, and never attribute[s] authority to anything that has not the recommendation of antiquity."[15] The Whig principle of

[14] *The Letters of David Hume*, ed., J. Y. T. Greig (Oxford: The Clarendon Press, 1932), II, p. 180.

[15] *Essays Moral, Political, and Literary*, op. cit., p. 480.

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consent suggests that each generation and each individual is competent to judge which laws shall be obeyed. This principle undermines respect for traditional ways, which is a condition of the rule of law. As Jefferson made clear, the doctrine of consent implies that only popular government is just. Jefferson criticized Hume bitterly for suggesting that just power need not be based on majority consent, for Hume's suggestion implies that there are other legitimate forms of government in addition to the republican form. The reader may decide whether Hume or Jefferson had more foresight as to the ultimate practical consequences of the doctrine of consent.

PROFESSOR ADAIR has called attention to the influence of Hume's essay on the "Idea of a Perfect Commonwealth" in shaping Madison's view of republican government. This important essay shows that political philosophy, as Hume conceived it, involves broader practical tasks than the mediation of factional disputes.

Hume could assert that there are several legitimate forms of government besides the popular forms because he denied that consent is the *only* basis for legitimate government. Following tradition, he distinguished a variety of "pure" forms of government according to whether rule is by one person, a few men, or the many. In addition to the pure forms of government — monarchy, aristocracy, and democracy — Hume spoke of constitutions which are mixtures of two or more pure forms. He suggested that under certain conditions, any of these forms, including absolute monarchy, might be legitimate. Hume also divided governments according to whether rule is by law or by discretion.

In writing about the several forms of government, Hume did not deny, as would later relativism, that one form could be proved better than another. He agreed with the classical tradition in his belief that the forms of government must be ranked according to their merit. He avoided both the ordinary citizen's error of identifying his own form of government with the best form and the partisan's error of asserting that there is but one form of government that is best for all situations.

Hume's essay on the "Idea of a Perfect Commonwealth" indicated that he regarded a properly constructed republic as the best of these forms. In contrast to the Whig spokesmen, however, he set an example for the true friends of republican government by advancing his proposals with the utmost caution. His opening paragraphs are devoted to a warning against trying "experiments merely upon the credit of supposed argument and philosophy." The wise magistrate "will bear a reverence to what carries the marks of age; and though he may attempt some improvements for the public good, yet will he adjust his innovations as much as possible to the ancient fabric and preserve entire the chief pillars and supports of the constitution."

Plato and Aristotle had held that the best regime is rarely if ever possible. By the same token, Hume suggests the possibility but not the likelihood that the best regime might be established:

> And who knows, if this controversy were fixed by the universal consent of the wise and learned, but, in some future age, an opportunity might be afforded of reducing the theory to practice, either by a dissolution of some old government or the combination of men to form a new one in some distant part of the world?

Speculation about the best regime need not depend for its justification, however, on the assumption that the best regime can be instituted:

> In all cases it must be advantageous to know what is the most perfect in the kind, that we may be able to bring any real constitution or form of government as near it as possible by such gentle alterations and innovations as may not give too great disturbance to society.[16]

Hume's purpose in depicting the "best commonwealth" is to help statesmen and founders to formulate new constitutions or to improve old ones. Significantly, Madison refers to Hume as a "lawgiver."

[16] *Ibid.*, pp. 480-81.

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There is no need to enter here into the details of Hume's ideal commonwealth. He provided, in Madison's words, "a republican remedy for the diseases most incident to republican government." Hume believed that the main affliction of popular government in ancient times had been its turbulence, which transformed it into either anarchy or tyranny. Hume's republic, by contrast to the small republics of former times, is quite large in both territory and population. He held that factional disputes would be less violent and dangerous in a large republic. The large republic is made possible by a system of representation; checks and balances are devised by Hume to insure that the elected representatives will act in the public interest: "A republican and free government would be an obvious absurdity if the particular checks and controls provided by the constitution had really no influence and made it not the interest, even of bad men, to act for the public good."[17]

Hume's reputation as a political economist points to another mainstay of his "perfect commonwealth." He believed that the large republic could be made stable and prosperous by basing it on a commercial economy. Adam Smith, Hume's close friend, adopted the view that commerce is favorable to republican liberty and developed it at length in *The Wealth of Nations*. In that work, Smith describes Hume as the first writer to take notice of the fact that "commerce and manufactures gradually introduced order and good government, and with them, the liberty and security of individuals." [18]

Hume's conception of the tasks of political philosophy closely resembles that of Aristotle and the classical political philosophers. However, he chose a different standard to judge the forms of government. The ancients had taken their bearings by human excellence. They had insisted that in the best regime, wise statesmen would promote moral virtue in the citizens through wise laws, education, and honors. Hume took his bearings by liberty rather than virtue, and he insisted that the best regime is one that promotes the liberty of its subjects.

The ancients had believed that good government requires virtuous citizens and virtuous rulers. If liberty rather than excellence is taken as the political standard, the right of political authorities to produce moral virtue through coercive means—a right granted by the ancients—becomes questionable. Hume's "science of politics" finds a substitute for virtue through the skillful arrangement of political institutions. Thus, he was able to combine good government with minimal coercion. Human excellence was not essentially a political problem for Hume. In Hume's view, the political problem *par excellence* is to reconcile liberty which is not licence with authority which is not oppression: "Liberty is the perfection of civil society, but still authority must be acknowledged essential to its very existance."[19]

Hume's contemporary, Rousseau, also insisted that liberty should be the political standard. Rousseau did not, however, agree with Hume, that a large republic was possible. His perfect republic, which was modeled after Sparta, is harsh and austere. It is sustained by courage and other virtues, which require the restraint of the passions and the banishment of luxury. Hume shared Rousseau's belief that the ancient republics had necessarily been harsh and austere because their existence had depended on virtuous citizens. The modern commercial republic, however, would make possible the enjoyment of republican liberty without the sacrifices necessary in ancient times to sustain it. Indeed, the functioning of a commercial economy depends on the release of the passions rather than their restraint. Hume showed how liberty and luxury could be made compatible.

THE PROBLEMS surrounding the interpretation of Hume's political writings

[17] *Ibid.*, p. 99.

[18] (New York: The Modern Library, 1937), p. 385.

[19] *Essays Moral, Political, and Literary, op. cit.*, pp. 116-17.

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must be seen in the light of the practical purpose of those writings, which is to carry out a broad conception of the tasks of the political philosopher. One of these tasks is to moderate factional disputes. Another task is to depict the best form of government as a guide for legislators and founders of governments. Still another is to give advice on the improvement of existing governments. These tasks are partly in conflict with each other. This conflict, which is reflected in Hume's writings, is partly responsible for his having been charged with Toryism and inconsistency.

Hume's seemingly contradictory statements about monarchies and republics can be explained by these conflicting tasks. Hume believed firmly that the establishment of the best form of government is seldom possible. The most pressing tasks for the legislator and the political philosopher, therefore, are to improve existing regimes and to decide which forms of government are suitable for existing circumstances.

Hume was certain that republican government could not be instituted successfully in England. He believed that limited monarchy, which admittedly is an imperfect form of government, was best for his contemporary England. In his writings, he was confronted with the delicate task of depicting the best form of government without weakening support in England for the existing form. In the "Idea of a Perfect Commonwealth," therefore, Hume discusses "the chief alterations that could be made on the British government, in order to bring it to the most perfect model of limited monarchy."[20] He does not mention the possibility of bringing England to the most perfect model, i.e., the republican form.

While this practical purpose helps to explain Hume's apparent vacillation between a preference for republican government and a preference for limited monarchy, it does not explain his explicit approval of absolute monarchy, which Locke had called "no form of civil government at all."

As Mossner points out, Hume was sceptical of the notion of continuous human progress. Hume shared the classical position that political systems inevitably decline. He rejected Harrington's view that the best commonwealth can be so constructed as to escape decay. Thus, he was forced to take into account the possibility that conditions in England might someday be unsuited for even a limited monarchy. He had to prescribe for such an eventuality and to prepare public opinion for it and entered upon these tasks in the essay "Whether the British Government Inclines More to Absolute Monarchy or to a Republic." In this essay, Hume predicts that the time will come when England will have to choose between absolute monarchy and republican government. Convinced that republican government would be disastrous for England, Hume writes: "I would frankly declare that, though liberty is preferable to slavery in almost every case, yet I should rather wish an absolute monarch than a republic in this Island."[21] In other essays, Hume develops the possibility that even absolute monarchy can be tempered by the rule of law.

THE CONFUSION as to whether Hume was a Whig or a Tory as well as other problems in his political writings can be resolved largely in terms of his conception of the practical problems of political philosophy. Hume was faced with the delicate task of setting forth what is best in theory without weakening public acceptance of what was best under particular circumstances. He had to write for the present and the future, for England and other nations, for philosophic men and the vulgar, about topics which are essentially controversial. In order to reconcile Whigs and Tories and to encourage moderate opinions, he was forced to emphasize not what is theoretically true, but what was beneficial under existing conditions. Hume cannot be identified with either

[20] *Ibid.*, p. 491.

[21] *Ibid.*, p. 126.

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faction, for he wrote always as a philosopher and not as a partisan.

In order to understand Hume's writings properly, it is necessary to grasp his conception of the tasks of political philosophy. One reason for the failure of recent interpreters to understand the intention of Hume's political writings is the change just after his time in the meaning of political philosophy. Adair calls attention to this change when he writes that after the French Revolution, "'philosopher' would be a smear-word, connoting a fuzzy-minded and dangerous social theorist—one of those impractical Utopians whose foolish attempts to reform society according to a rational plan created the anarchy and social disaster of the Terror."[22]

Many of the differences between Hume and Burke can be traced to their differing attitudes toward philosophy. Hume recognized as fully as Burke that imprudent philosophers could be highly dangerous. Yet unlike Burke, Hume saw that practical political activity is ultimately dependent on theoretical guidance. Hume believed that one task of the philosopher is to advise legislators on proper forms of government. It was in this respect that Madison, who calls Hume a "lawgiver," was influenced by Hume's writings. Burke's hostility to theory as such, and not merely misused theory, blinded him to the sense in which constitutions are created rationally. Hume's praise for the founders of governments contrasts sharply with Burke's statement that "the very idea of the fabrication of a new government is enough to fill us with disgust and horror."[23] Burke tended to hold that whatever survives historically is best. Philosophy furnished Hume with a trans-historical standard. The practical consequence of this difference is to be seen in the fact that while Burke tended to accept the British Constitution as the model, Hume, by virtue of his theoretical understanding of the nature of the best regime, fully recognized its imperfections.

[22] Adair, *op. cit.*, p. 344.

[23] *Reflections on the Revolution in France* (Chicago: Henry Regnery Co., 1955), p. 50.

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The Judicial Philosophy of Felix Frankfurter

MARTIN GLASSER

IN HIS DISCUSSION of the causes of the dissolution of the United States in 1861, Lord Acton stated that "democracy . . . must stand or fall according to its choice, whether to give the supremacy to the law or to the will of the people."[1] Since the end of the Civil War we have been more or less continuously choosing in favor of the supremacy of the will of the people. During this period only the branch of government not responsible to the populace, the Supreme Court, resisted the popular will and stood as a bulwark in defense of the law and the concept of limited government proclaimed by the Constitution. In doing its traditional task of defending liberty against the encroachment of the State, it earned the scorn of the many "progressive" social thinkers who looked with anger at the Court for striking down their legislation.

As the tradition of liberty gradually eroded under the pounding of its critics, the Court slowly renounced its duty to enforce the Constitution and eventually capitulated. Foremost among the present members of the Court who have led in this renunciation is Associate Justice Felix Frankfurter. Appointed to the Court in 1939, he personifies the Court's efforts to prostrate itself at the feet of the popular branches of government.

With the New Deal came a series of laws which violated the spirit of the Constitution. Twelve of these laws were struck down by the Supreme Court as unconstitutional. But even while the Court was dealing setback after setback to the New Deal, the minority of the justices who supported the interventionist legislation were erecting the judicial philosophy of "self-limitation" or "self-restraint" which was later to dominate the Court. Justice Stone's statement that "the only check upon our own exercise of power is our own sense of self-restraint,"[2] set the pace for this group.

The Justices who opposed the interventionist measures of the legislature were following the classical doctrine of judicial review, first applied by Chief Justice Marshall in the famous case of *Marbury vs. Madison.*[3] Marshall stated that it is the duty of the Judiciary to decide which among conflicting rules governs a case. If the conflicting rules are the Constitution and ordinary law, the Constitution as the paramount law of the land must prevail. If the legislature is free to pass laws without regard for the Constitution, the Constitution must be rendered ineffectual. To the Judiciary evolves the duty of seeing that constitutional limits are observed, since it cannot be expected that the legislature will enforce the Constitution against itself. The conservative Justices rather than the "judicial restraint" wing

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[1] "Political Causes of the American Revolution," *Essays on Freedom And Power*, ed. Gertrude Himmelfarb (New York, 1955), p. 171.

[2] *United States v. Butler*, 297 U.S. 1, p. 79 (1936).

[3] 1 Cranch 137 (1803).

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of the Court were in the classic stream of constitutional interpretation when they struck down the interventionist economic legislation, although these same conservative justices were often as unwilling to apply judicial review in defense of civil rights as the present court is to apply it in defense of property rights.

Those who upheld the Marshallian view were soon crushed. In 1937 the Court capitulated and the New Deal went on a rampage. Eventually, with the death and retirement of the alleged reactionaries, the Court became entirely dedicated to the ideal of judicial self-restraint. However, there arose a faction which put limits on the idea of judicial self-restraint. This faction did not derive from those judges who followed Marshall. but found its roots in the decisions of Justice Brandeis. Brandeis was one of the earliest American advocates of government intervention, but was also one of the staunchest defenders of civil liberties. It was he who said that "experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent."[4] This school of thought is known as "activism" or "dynamism" because of its advocacy of judicial review in cases concerning civil rights. It stands for an absolute view of the First Amendment. Its opponents sneeringly refer to its position as the defense of "preferred liberties."

In opposition to the activists, those who followed judicial self-restraint all the way put up the old arguments which were founded on the decisions of Justice Holmes and which were used against the conservatives who defeated Roosevelt's pre-1937 legislation. They represented an extreme reaction to the conservative view. Whereas the conservatives vetoed freely those laws they thought to be unconstitutional, the self-restraint school insisted on abstention from almost all interference with the "representatives of the people." They claimed that the conservatives abused judicial review. Of course, judicial review was not abused, the legislature merely abused the Constitution. This confusion is not rare. The conservative Justices were accused of asserting property rights to the detriment of human rights, whereas they only maintained that property rights are an inseparable part of human rights.

With this extreme fear of judicial review, the self-restrainers saw no reason to make exceptions in civil liberties cases. Needless to say, the controversy over whether civil liberties are to follow property rights out of the fold of judicial protection has totally obfuscated any thought of property rights. The main issue today is that between Justices Douglas and Black on the activist side, and Justice Frankfurter on the self-restraint side, in the battle over whether civil rights shall remain exempt from the popular will in the form of Congress, the President, and the state governments.

From a liberal point of view, neither side is attractive.[5] However, the Douglas-Black activist position does have two things in its favor:

(1) It is in favor of protecting civil rights which should be dear to all true classical liberals.
(2) It keeps alive the spark of a judiciary which is alert to its duty of enforcing the Constitution against the government and gives us hope that this spark may someday burst into a flame that will topple the interventionists and their laws.

As mentioned previously, the Frankfurter position was loosely derived from Holmes. Holmes once said to Justice Stone: "About seventy-five years ago I learned that I was not God. And so, when the people . . . want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, 'God-dammit, let 'em do it!' "[6] Frankfurter's judicial philosophy builds on this brief and informal statement.

[4] *Olmstead v. United States*, 277 U.S. 438, p. 479 (1928).

[5] I use the term liberal according to its 19th century meaning. The 19th century liberal attempted to limit state power and activity and to foster the liberty of the individual.

[6] As quoted in Bernard Schwartz, *The Supreme Court* (New York, 1957), p. 23.

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An admirer of Frankfurter has said of him that:

> He would resolve all reasonable doubt in favor of the integrity of sister organs of government and the people to whom they must answer. He would adhere, that is, to the deepest of all our constitutional traditions, the dispersion of power—though, as in the "flag salute" cases, the immediate result offends his own generous heart's desire. He is wary of judicial attempts to impose justice on the community; to deprive it of the wisdom that comes from self-inflicted wounds and the strength that grows with the burden of responsibility. It is his deepest conviction that no five men, or nine, are wise enough or good enough to wield such power over the lives of millions. In his view, humanitarian ends are served best in that allocation of function through which the people by a balance of power seek their own destiny. True to the faith upon which democracy ultimately rests, the Justice would leave to the political processes the onus of building legal standards in the vacuum of doubt. For in his view only that people is free who chooses for itself when choice must be made.[7]

Readers of Orwell's *Nineteen Eighty-Four* will recall the insidiously illiberal effects of altering the definitions of words. The above panegyric illustrates Orwell's contentions. One may easily assume that the person described is a liberal and not suspect that he defends the government's aspiration to omnipotence.

Professor Wallace Mendelson, the author of this plethora of praise, establishes Frankfurter as the champion of the people. It is indeed a noble task to defend the free choice of the people! However, one must be forgiven for closer investigation of precisely what comprises the "people" as defined by Professor Mendelson and Oliver Wendell Holmes, Jr. They were, it appears, under the impression that the people and the legislature are coextensive. But no less a thinker than John Stuart Mill was of the opinion that "the 'people' who exercise the power, are not always the same people with those over whom it is exercised, and the 'self-government' spoken of, is not the government of each by himself, but of each by all the rest."[8] In a manner similar to Rousseau's wonderful transposition of the people into the General Will, the apologists for unlimited legislative power have transposed the people into the legislature.

PRACTITIONERS OF Hitler's "big lie" technique would be unsurprised at the effectiveness of this method. Expedience is the only criterion for a self-aggrandizing politician. Why is the politician aided in his task by those who should be disinterested in these matters? Yet they do aid him by confusing free individual action with the decisions of the legislature. So liberally-oriented minds become confused in their efforts to distinguish between demagoguery and the liberal point of view. America's tradition could absorb the New Deal only through semantic tricks which identified it with its arch-enemy, liberalism. In this spirit Frankfurter and company scream about the "essential democracy," free choice, and seeking one's own destiny, while opting for elective despotism.

Of course the villains of these Statist theatrics are the Supreme Court Justices, for whether they exercise it or not, they hold the constitutional power to veto the alleged free choice of the people. And "even the narrow judicial authority to nullify legislation . . . serves to prevent the full play of the democratic process."[9] Further, by refusal to exercise their veto, they inevitably place the stamp of constitutional authorization on interventionist legislation in the eyes of the public.

According to Frankfurter, "to fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies . . . serves to vindicate the self-confidence of a free people."[10] That is, the democratic process justifies the confidence of the people and aids in their growing political

[7] Wallace Mendelson, *Justices Black and Frankfurter: Conflict in the Court* (Chicago, 1961), p. 131.

[8] *On Liberty* (New York, 1873), p. 14.

[9] *West Virginia v. Barnette*, 319 U.S. 624, p. 650 (1943).

[10] *Minersville v. Gobitis*, 310 U.S. 586, p. 600 (1940).

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maturity. The legislature must assume responsibility for public policy and not the Supreme Court.

The only thing that grows with the burden of legislative responsibility is power, and as power mounts, freedom recedes. The legislature assumes responsibility which rightfully belongs to the people, and I use the term "people" in its simple, ungarnished definition. The only thing that can teach the legislature responsibility—and by this I mean, the knowledge of its proper *limits*—is to have the Court remind them of the exact extent of its power, whenever this power is exceeded.

Thus the idea that each man should decide for himself has been twisted to mean that the legislature should decide for itself without being called to account by the Court. In fact, the Statists have assigned to the Court the position that the liberals have assigned to the legislature; and, further, they have assigned to the legislature the position that the liberals have assigned to the people. The result is that freedom has become power.

Even the venerable concept of judicial impartiality has been violated by such reasoning. Frankfurter contends that "it can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench."[11] A judge should not write his "private notions of policy into the constitution."[12] What does Frankfurter suppose *he* is doing when he abstains from invalidating laws? Inaction, as well as action, is a manifestation of "private notions."

This is only an aspect of Frankfurter's type of judicial impartiality. The crux of his injustice to this concept is his complete misuse of it. The idea of judicial impartiality implies that the judge should unbiasedly apply the law in all cases. Frankfurter wants the Court to generally refrain from invalidating any legislation as being unconstitutional. He has dressed the policy of judicial self-restraint in the robes of an impartial refusal to impress one's personal ideas on the adjudication of a case. An independent judge, not to be influenced by any considerations but constitutionality, is seen to be biased, whereas a judge who slavishly follows the legislature is hailed as one who refrains from imposing his own feelings on a case.

Translated into action Frankfurter's ideals turn out such decisions as those in the flag salute cases.[13] In these cases Frankfurter talks about the problems of national security and individual freedom in a most grandiloquent manner, concluding that if we are to cater to each individual conscience we must weaken our national security.

It seems that the threat to our national security came from certain young school children who refused to salute the flag on the basis of sincere religious belief. More confusion: this time highfaluting principles were related to irrelevant facts. Will the United States crumble if a group of children refuse to salute the flag? God save America if this be so, because the compulsory flag salute won't. Nobody can deny the primacy of national security; anybody can deny that the few school children in this case threatened it.

But Frankfurter states that it isn't his duty to decide on the wisdom of an act of a legislature (i.e., in at least one of these cases, the Board of Education which was constituted by the legislature). Although those Justices who decided in favor of the school children probably thought that they had acted wisely on the basis of some extraconstitutional moral standard, they voted for the school children strictly on the basis of their constitutional position — that the fourteenth amendment guarantees religious liberty through its incorporation of the first amendment. The ones who acted emotionally in these cases were Frankfurter and his followers, and they voted according to their emotional attachment to unrestricted majority rule.

The only thing that Frankfurter can offer to the Jehovah's Witnesses is the glory of the democratic process. What does this mean? A hopeless minority

[11] *West Virginia v. Barnette*, p. 647.
[12] *Ibid.*

[13] *Minersville v. Gobitis* and *West Virginia v. Barnette.*

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must campaign to change the prejudicial laws of a hostile majority. But it was precisely the purpose of the Constitution to guard against the majority's incursions into minority rights, so that the minority would not have to rely on the capricious tolerance of the majority. It is essential to democracy that the polls be open to all; it is essential to liberty that individual rights are not determined at the polls.

In these cases, Justice Brandeis' warning against governmental interference with liberties in the name of some beneficent purpose has been ignored. National security has been set up as a basis for trampling on religious liberty just as political freedom was trampled on in cases where allegedly subversive activity was subject to restrictive legislative activity.

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In voting against the Communists' political freedom, Frankfurter tells us that the government must be strong enough to survive. The German Communists, along with the Jews, were the first inmates of Hitler's concentration camps. Both of these groups represented a threat to the safety of the Reich. By legislative inquisition and prior arrest (i.e., arrest for yet to be committed crimes, or such committed crimes as advocacy or conspiracy), we follow the same path. Just as flag salutes will not save us, deprivation of the Communists' political liberties will not save us. However, it cannot be denied that the latter method will most definitely preserve a land that bears a striking geographical resemblance to the United States, but with none of its political characteristics.

In the Dennis case, Frankfurter asserts that the decision as to whether freedom or national security shall prevail entails the utilization of a balancing process. Needless to say this process is the function of the Congress for the "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society."[14]

After listing the usual facts against the Communists, Frankfurter poses these questions to the Court: "Can we then say that the judgment Congress exercised was denied it by the Constitution? Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice? Can we hold that the First Amendment deprives Congress of what it deemed necessary for the Government's protection?"[15] The answer is clear. The first amendment deprives the federal government of the power to abridge freedom of speech.

The defendants in *Dennis* were convicted of such nebulous crimes that one is reminded of the prosecutions common to Czarist or Communist Russia. The Constitution provides for treason. No one would oppose the conviction of seditioners. *These men are accused of conspiring to teach conspiracy!*

THE PROBLEM IS that we have simply ignored the form the internal Communist threat is taking. And Frankfurter seems to realize this when he quotes George Kennan's plea for an end to the use of Communist technique in the struggle against them.[16] However, Frankfurter insists policy decisions are within the sphere of the Congress and not the Court. He may acknowledge that a policy is unwise, but he may not strike it down on this basis. The formula of leaving it to Congress is nothing more than a declaration that the only restraint on Congress is its own self-restraint. It is merely deceptive to talk about a balancing process between national security and freedom of speech when the only spokesman for the latter side has disqualified itself. In a word, the whole thing adds up to the end of freedom for anyone who does not have the votes to protect himself.

The most horrible thing about all this is Frankfurter's usually persistent advocacy, especially in the flag salute cases, of keeping open the "remedial channels" of the "democratic process." This should be sacrosanct and beyond legislative interference. Everyone must be entitled to campaign for seeing his own point of view prevail in the legislature. Everyone? Obviously the American Communist

[14] *Dennis v. United States*, 341 U.S. 494, p. 525 (1950).

[15] *Ibid.*, p. 551.

[16] *Ibid.*, pp. 554-555.

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is of a certain gender which finds no place in the expression "everyone."

It is true that Frankfurter maintains in *Dennis* that "the democratic process at all events is not impaired or restricted."[17] But the Communist Party was outlawed and prevented by law from partaking in the democratic process. It is true that non-Party members could restore its liberty, but it cannot be denied that the remedial channels had been all but completely blocked through the illiberal rules of the Smith Act.

Individual liberty has found no friend in Frankfurter in a variety of other cases. In *Beauharnais v. Illinois*[18] his opinion upheld a criminal libel statute as applied to an area of discussion proscribed by the state: publications which expose "the citizens of any race, color, creed or religion to contempt, derision or obloquy." The defendant had distributed leaflets expressing opinions against the Negro race which, however reprehensible, were probably shared by a large percentage of Americans. He was not permitted to defend himself by showing either the truth of the statements or the fact that they were not likely to produce a clear and present danger of public disturbance.

In *Korematsu v. United States,*[19] it was determined that the Constitution allows the nation to conduct war. Frankfurter maintains that "to talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as an unconstitutional order is to suffuse a part of the Constitution with an atmosphere of unconstitutionality."[20] In other words, constitutional guarantees are to be overruled by the generals (with the aid of Congress) whenever they feel that it is good tactics, because they have the power to wage war. American citizens who committed no other crimes, but to be of a minority racial origin, must be placed in concentration camps, because the generals think that it is good tactics. It becomes quite obvious that in wartime we are subject to the generals, and we may enjoy what liberty they care to bestow, if this rule is to be followed. The amazing thing in this case is that the uncontradicted evidence points to Korematsu's unswerving loyalty to the United States.

In his pre-Supreme Court writing and activity, Frankfurter had demonstrated a high regard for aspects of freedom. I think particularly of his part in the Sacco-Vanzetti case and the post-World War I red-baiting activity. However, his judicial thinking has been so dominated by the idea of majority supremacy as manifested by the legislature, that it is impossible to think of him as being in any way a friend of freedom. His attacks on the preferred freedoms of Justice Black and Douglas indicate that he prefers no freedom other than what the representatives of the people care to bestow. And as Lord Acton suggests, freedom has no basis in arbitrary will—even the will of the majority.

IN HIS CLASSIC essay, *On Liberty,* John Stuart Mill states that the aim "of patriots, was to set limits to the power which the ruler should be suffered to exercise over the community; and this limitation was what they meant by liberty."[21]

Frankfurter's patriot would not acknowledge any limit to the power of the state (which he would spell with a capital "S"). Alexis de Tocqueville described this mentality: "The French, under the old monarchy, held it for a maxim . . . that the King could do no wrong . . . . The Americans entertain the same opinion with respect to the majority."[22] So the Divine Right of kings becomes the Divine Right of majorities.

Liberals have always fought authority, and the most perceptive did not give up the fight when the *anciens regimes* of Europe disintegrated. Instead they noted and took issue with a new source of authority. Lord Acton, Mill, and Tocqueville all warned against the tyranny of the majority.

Acton stated: "By liberty I mean the assurance that every man shall be protected in doing what he believes his duty

[17] *Ibid.,* p. 552.
[18] 343 U. S. 250 (1951).
[19] 323 U.S. 214 (1944).
[20] *Ibid.,* pp. 224-225.
[21] Pp. 10-11.
[22] *Democracy in America* (New York, 1900), I, pp. 259-260.

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against the influence of authority and majorities, custom and opinion."[23]

Mill held that "the majority, or those who succeed in making themselves accepted as the majority: the people, consequently, *may* desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power."[24]

Tocqueville forecast: "If ever the free institutions of America are destroyed, that event may be attributed to the unlimited authority of the majority."[25]

But the lessons of these men have not been heeded and today Frankfurter rests his case for democracy on the right of the citizen to cast a vote for the demagogue who promises the most. His "democratic process" is the only thing that distinguishes our system as it is now from self-admittedly reactionary systems. No longer is the individual sovereign in his own sphere—the majority is. All limits have been thrown to the wind. There is no convincing the alleged progressive that a living Constitution is not a dead Constitution. They firmly believe that "true" democracy can only be manifested by unhindered majority rule and individual or minority conscience is irrelevant to the definition of democracy.

The framers of the Constitution were not so cavalier about minority rights. They viewed their product as being analogous to a corporation charter. The charter allows the corporation to undertake certain activities and forbids them others. When the corporation acts *ultra vires,* it acts illegally. The Constitution is the charter of the federal government and it defines the limits of the government's powers. When the government exceeds these limits, it acts illegally. The sovereign majority is supreme within the public sphere, but acts illegally when it acts beyond that constitutionally-defined sphere.

John Locke favored the right to revolt when the government acted beyond its limits. In the United States the judicial safeguard to the Constitution was invented as a peaceful substitute. That is, the courts are to look after our liberty, and for this purpose they must be totally independent of the ebb and flow of political events.

It is Frankfurter's contention that "to the legislature no less than to the courts is committed the guardianship of deeply-cherished liberties."[26] In reply to this it may be worthwhile to quote James A. Bayard:

> How vain is a paper restriction if it confers neither power nor right. Of what importance is it to say, Congress is prohibited from doing certain acts, if no legitimate authority exists in the country to decide whether an act done *is* a prohibited act? Do gentlemen perceive the consequences which would follow from establishing the principle that Congress have the exclusive right to decide on their own powers? This principle admitted, does any Constitution remain? Does not the power of the Legislature become absolute and omnipotent? Can you talk to them of transgressing their powers, when no one has a right to judge of those powers but themselves?[27]

Of course liberty cannot long endure if the spirit of the nation is hostile to it, regardless of even a determined Court. The Court can only check occasional lapses from constitutionality; in the long run, the Congress will approve only those judges who will abide by its policy. The people must be shown that the policy of liberty is still valid.

Conservatives today speak much of a renaissance of their ideals. Unfortunately, liberalism cannot make the same claim. There is no popular opposition to the principles of Statism today. Liberalism is hardly known, let alone followed. Intellectuals either regard it as outdated or as having organically developed into what is called liberalism today. Many think of John Stuart Mill's development from a liberal to an admirer of moderate socialism as symbolic of the development of liberalism.

Although the future looks bleak, the liberal acknowledges no laws of history and therefore knows liberty will remain within reach as long as he strives for it.

[23] "The History of Freedom in Antiquity," *Essays On Freedom And Power,* op. cit., p. 55.
[24] *On Liberty,* p. 14.
[25] *Democracy In America,* I, p. 273.
[26] *Minersville v. Gobitis,* op. cit., p. 600.
[27] As quoted in Schwartz, op. cit., p. 7.

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COMMUNICATION:

The Intellectual Collapse of European Socialism

WILHELM ROEPKE

THERE HAS BEEN occurring recently in Europe something which can hardly be surpassed in significance. For more than a century the idea of socialism and the socialist movement have so shaken the foundations of our civilization that one could well write the history of these hundred years—let us say, from the *Communist Manifesto,* in 1847, to the challenge directed against the world by the Communist Empire—from the perspective of the intellectual, social and political struggle over socialism.

The intellectual origin of modern socialism lies in the French Revolution of 1789 and its painful consequences. But no country has been more important for the further advance of socialism in Europe, and in the rest of the world, than Germany. It was three German intellectuals — Marx, Engels, and Lassalle — who cast the socialist idea into the form in which it captured the masses, and among these three, Marx quickly became the real leader. It is, then, the socialist party of German, which, in the name and spirit of Karl Marx, but also making use of Prussian discipline and talent for organization, has made this country into a model of the socialist movement. No socialist party was more respected than this one, none had greater power and authority. From the German Social Democrats — this was the new name which the German socialists soon took for themselves— the socialist leaders of other countries derived the spirit and the technique of the modern mass-party, and its program became a model to the others. It is obvious that, without Marx, there would have been no Lenin, and ultimately, no Khrushchev. But it is even questionable whether the triumph of Communism in Russia would have been at all possible without the preliminary work of German Social Democracy and its great leaders from Liebknecht to Bebel.

And, now what is the great event of which I spoke at the beginning? Nothing less than the fact that this German Socialist Party, on November 15, 1959, at Bad Godesberg, adopted a new program which leaves scarcely anything over from its socialist tradition but the name. This tradition meant that the socialists demanded "socialization," i.e., the expropriation of banks, mines or industrial firms by the state. This demand has now been buried. The tradition further demanded the ordering of economic life through a planned economy, which would replace the market, competition, the free play of supply and demand, and the unhampered initiative of free entrepreneurs by the decree of the state and the administration of the economy by the state's bureaucracy. This demand, too, has disappeared from the program of German Social Democracy. The party now explicitly confesses to the tried and proven merits of com-

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petition, of free prices and of entrepreneurial initiative, thereby appropriating to itself the liberal economic policy of the hitherto so bitterly attacked and derided Economic Minister Erhard. Just a few years ago the socialists — the Germans and those of other countries—were prophesying an ignominous end for this "social market economy": now they acknowledge it to be incomparably superior to the socialist concept of the planned economy, and the German socialists have taken it up themselves. The name "Marx" appears nowhere in the whole program. Moreover, there is virtually not a trace left of his spirit. Adam Smith, the founder of liberal economic theory, has triumphed over Marx.

The socialist party of Germany, in a word, no longer wishes to bring about that economic order which has hitherto been its principal aim, and which is realized in its purest form throughout the Communist world empire. The socialists confess that they set greater store by free competition, free prices and free entrepreneurial initiative than by a planned economy, state-run enterprises and central direction of production and consumption. This is indeed astounding but will surprise no one who has attentively followed the development of socialism in Germany, as well as in other countries. In Germany, as in Switzerland and Great Britain, it has become especially evident that the old socialists' program of socialization and the planned economy has not only lost its previous overpowering force, but actually repels the great masses of voters. For these voters fear that the realization of this program might imperil the extraordinary prosperity which the masses in these countries are enjoying. They have been furnished with an object lesson in political economy, such as no previous generation ever experienced. The fiasco that socialist parties have suffered in every case in which they were offered the opportunity to carry out their program of socialization and the planned economy is as gross and palpable as the success of the opposite, liberal course of the market economy and economic freedom. The last great nations in Europe which have once more demonstrated this have been Great Britain and France.

If the socialist parties do not take this development into consideration, they will be in danger of losing more and more political ground. They run the risk of "perishing as sects," as the Chairman of the German Social Democrat Party, Herr Ollenhauer, exclaimed at Bad Godesberg, in his effort to have the new program adopted.

It is certainly doubtful whether this complete capitulation of the German socialists to the principles of economic liberalism is the expression of an honest conviction. That would be more than one could expect. The fight over the new program was not settled without the supporters of the socialist tradition and the modernists finally coming to terms, and a great deal of compromise between socialism and liberalism was necessary. One can even be of the opinion that these compromises would allow a socialist government much of the "old" socialism, without the government having openly to disavow its program. In short, the capitulation of socialism to liberalism is neither absolute nor free from the suspicion of being, to a certain degree, a political maneuver. But, in the first place, it is that to a certain degree only: in the case of many German socialists, the conversion is genuine and honest. And, in the second place, the new program demonstrates, at any rate, the compelling power that the liberal economy, i.e., the economic system based on the market, competition, free prices, private property and entrepreneurial initiative—has gained over the voting masses through its own success and through the failure of the socialist economy. It is important to recognize that this turnabout of German Social Democracy would scarcely have been possible if the Communist Party had not been outlawed as incompatible with the Constitution. It has been only through this that Social Democracy won the freedom of maneuver necessary for the change in program: otherwise, it would have had to fear the defection of its radicals leftwards, to the Communists.

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On Freedom and the Law[1]

MURRAY N. ROTHBARD

WHILE AT LEAST a corporal's guard of libertarian economists exists in America today, the situation in the other disciplines of human action is indeed bleak. Most political scientists, for example, are either engaged in spinning fallacious scientistic "models" or in solemnly recording the empirical *minutiae* of the workings of government bureaucracy. The small minority of political philosophers (those who still grapple with such basic questions as the nature and proper function of the State) trumpet the alleged glories of Order, Tradition, Community, the "Leap in Being," and Good Manners, but somehow remain silent about the liberty of the individual. This pervading miasma makes all the more welcome the publication of a notable series of lectures by Professor Bruno Leoni, eminent jurist and political scientist of the University of Pavia, Italy. For here at last is a political scientist with strong libertarian inclinations.

Professor Leoni's major thesis is that even the staunchest free-market economists have unwisely admitted that laws must be created by governmental legislation; this concession, Leoni shows, provides an inevitable gateway for State tyranny over the individual. The other side of the coin to increasing intervention by government in the free market has been the burgeoning of legislation, with its inherent coercion by a majority —or, more often, by an oligarchy of pseudo-"representatives" of a majority— over the rest of the population. In this connection, Leoni presents a brilliant critique of F. A. Hayek's recent writings on the "rule of the law." In contrast to Hayek, who calls for general legislative rules as opposed to the vagaries of arbitrary bureaucracy or of "administrative law," Leoni points out that the real and underlying menace to individual freedom is not the administrator but the legislative statute that makes the administrative ruling possible.[2] It is not enough, demonstrates Leoni, to have general rules applicable to everyone and written down in advance; for these rules themselves may—and generally do—invade freedom.

Leoni's great contribution is to point out to even our staunchest *laissez-faire* theorists an alternative to the tyranny of legislation. Rather than accept either administrative law *or* legislation, Leoni calls for a return to the ancient traditions and principles of "judge-made law" as a method of limiting the State and insuring liberty. In the Roman private law, in the Continental Civil Codes, in the Anglo-Saxon common law, "law" did not mean what we think today: endless enactments by a legislature or executive. "Law" was not *enacted* but *found* or discovered; it was a body of customary rules that had, like languages or fashions, grown up spontaneously and purely voluntarily among the people. These spontaneous rules constituted "the law";

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[1] A review of Bruno Leoni, *Freedom and the Law* (Princeton: D. Van Nostrand, 1961).

[2] Leoni also presents an effective critique of Hayek's defense of special "administrative courts." If there is to be one law for bureaucrats and yet another for ordinary citizens, then there is no equality under *the* law for everyone, and therefore there is no genuine "rule of law." Here, as elsewhere, Leoni rehabilitates the stringent rule of law championed by the great nineteenth century English jurist, A. V. Dicey, as contrasted to the weaker modern versions of Hayek and C. K. Allen.

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and it was the works of experts in the law — old men of the tribe, judges, or lawyers — to determine what the law was and how the law would apply to the numerous cases in dispute that perpetually arise.

If legislation is replaced by such judge-made law, says Leoni, fixity and *certainty* (one of the basic requirements of the "rule of law") will replace the capriciously changing edicts of statutory legislation. The body of judge-made law changes very slowly; furthermore, since judicial decisions can only be made when parties bring cases before the courts, and since decisions properly apply only to the particular case, judge-made law — in contrast to legislation — permits a vast body of voluntary, freely-adopted rules, bargains, and arbitrations to proliferate as needed in society. Leoni brilliantly shows the analogy between these free rules and bargains, which truly express the "common will" of *all* participants, and the voluntary bargains and exchanges of the free market.[3] The twin of the free market economy, then, is *not* a democratic legislature ever grinding out new *diktats* for society, but a proliferation of voluntary rules interpreted and applied by experts in the law.

While Leoni is vague and wavering on the structure that his courts would take, he at least indicates the possibility of privately competing judges and courts. To the question: who would appoint the judges, Leoni answers with the question: who now "appoints" the leading doctors or scientists in society? They are not appointed, but gain general and voluntary acceptance on their merits. Similarly, while in some passages Leoni accepts the idea of a governmental supreme court which he admits becomes itself a quasi-legislature,[4] he does call for the restoration of the ancient practice of *separation* of government from the judicial function. If for no other reason, Professor Leoni's work is extremely valuable for raising, in our State-bemused age, the possibility of a workable separation of the judicial function from the State apparatus.

A GREAT DEFECT in Leoni's thesis is the absence of any criterion for the *content* of the judge-made law. It is a happy accident of history that a great deal of private law and common law is libertarian, that they elaborate the means of preserving one's person and property against "invasion." But a good deal of the old law was anti-libertarian, and certainly custom can not always be relied on to be consistent with liberty. Ancient custom, after all, can be a frail bulwark indeed; if customs are oppressive of liberty, must they still serve as the legal framework permanently, or at least for centuries? Suppose ancient custom decrees that virgins be sacrificed to the gods by the light of the full moon, or that red-heads be slaughtered as demons? What then? May not custom be subject to a higher test—reason? The common law contains such anti-libertarian elements as the law of "conspiracy," and the law of "seditious libel" (which outlawed criticism of the government), largely injected into the law by kings and their minions. And perhaps the weakest aspect of the volume is Leoni's veneration for the Roman law; if the Roman law provided a paradise of liberty, how account for the crushing taxation, the periodic inflation and currency debasement, the repressive network of controls and "welfare" measures, the unlimited imperial authority, of the Roman Empire?

Leoni offers several different criteria for the content of the law, but none are very successful. One is *unanimity*. But while superficially plausible, even explicit unanimity is not necessarily libertarian; for, suppose that there are no Moslems in a country, and everyone unanimously decides—and it passes into custom—that

[3] This contrasts to the mocking claim of "democratic" legislatures which coercively impose their rules upon dissenters, to be expressions of the "common will." To be "common," Leoni points out, the common will must be a *unanimous* one.

[4] At one point, Leoni seems to believe that the requirement of unanimity on the Supreme Court bench for any change over previous rulings would approximately establish the "Leoni model" on the American scene. But here all depends on the "zero point" at which a unanimity requirement is introduced. In the present heavily State-ridden world, a unanimity requirement for change would tend to fasten our Statist regulations permanently upon society.

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all Moslems should be put to death. And what if, later, a few Moslems should appear in the land? Further, as Leoni recognizes, there is the problem of the *criminal;* certainly *he* does not join in favoring his own punishment. Here Leoni falls back on a tortured construction of implicit unanimity, i.e., that, in such a case as murder or theft, the criminal *would* agree to the punishment if *anyone else* were the criminal, so that he *really* agrees to the justice of the law. But suppose that this criminal, or others in the community, have the philosophical belief that certain groups of people (be they red-heads, Moslems, landlords, capitalists, generals, or whatnot) *deserve* to be murdered. If the victim is a member of one of these abhorred groups, then neither the criminal nor others holding this belief would agree to the justice of either the general law against murder or to the punishment of this particular murderer. On this ground alone, the implicit unanimity theory must fall.

A second proffered criterion for the content of the law is the negative Golden Rule: "Do not unto others what you would not wish them to do unto you." But this too is unsatisfactory. For one thing, some acts generally considered criminal would still pass the negative Golden Rule test: thus, a sado-masochist can torture another person, but since *he* would be delighted to be tortured, his act, under the negative Golden Rule, could not be considered criminal. On the other hand, the Golden Rule is much too wide a criterion; many acts would be condemned as criminal which should certainly not be. Thus, the Rule decrees that men shouldn't lie to each other (a man would not want to be lied to) and yet few would urge that all lies be outlawed. Also, the Golden Rule would decree that no man should turn his back on a beggar, because the former would not want the beggar to turn his back on him were they to change places—and yet, it is hardly libertarian to outlaw the refusing of alms to a beggar.[5]

Leoni hints at a much more promising criterion: that freedom be defined as the absence of constraint or coercion—except against constrainers. In this case, the *initiation* of coercion is outlawed, and the "governmental" function becomes strictly limited to coercing the coercers. But, most unfortunately, Leoni falls into the very same trap that snared Hayek in his *Constitution of Liberty*: "coercion" or "constraint" is not defined in a proper or cogent manner.[6] At first, Leoni gives promise of a correct understanding of coercion when he says that a man cannot be said to "constrain" another when he refuses to buy the latter's goods or services, or when he refuses to save a drowning man. But then, in his unfortunate Chapter 8, Leoni concedes that constraint may occur when a religiously devout person *feels* "constrained" because another man does not observe the former's religious practices. And this feeling of constraint may appear to justify such invasions of liberty as Sunday blue laws. Here again, Leoni errs in placing his test of constraint or coercion, not on the objective acts of the defendant, but on the subjective feelings of the plaintiff. Surely this is an extremely wide highroad for tyranny!

Furthermore, Leoni apparently does not see that taxation is a prime example of coercion, and is hardly compatible with his own picture of the free society. For if coercion is to be confined to the coercers, then surely taxation is the unjust coercive extraction of property from a vast body of *non*-coercing citizens. How, then, is it to be justified? Leoni, again in chapter 8, also concedes the existence of some legislation in his ideal society, including, *mirabile dictu*, some nationalized industries![7] One specific nationalization favored by Leoni is the lighthouse industry. His argument is that

[5] A critical error—in this and other places—is Leoni's tendency to make the test of criminality the *subjective feelings* of participants, rather than their objective actions.

[6] For an excellent critique of Hayek's conception of coercion, see Ronald Hamowy, "Hayek's Concept of Freedom: A Critique," *New Individualist Review*, (April, 1961), pp. 28-31.

[7] Thus, Leoni asserts that, in those fuzzy cases where criminality or constraint cannot be objectively determined, there exists room for coercive legislation on the subject. But surely the proper —and libertarian—rule is that fuzzy cases be decided in favor of *"laissez-faire"*—of letting the activity go on.

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a lighthouse could not charge individual consumers for its service, and that therefore it should be supplied by government. The basic answers to this argument are threefold: (1) the taxation for lighthouses imposes coercion and is therefore an invasion of freedom; (2) even if the lighthouse could not charge individuals, what prevents shipping lines from constructing or subsidizing their own lighthouses? The usual reply is that then various "free riders" would benefit from the service without paying. But this is universally true in *any* society. If I make myself a better person, or if I tend my garden better, I am adding to the benefits enjoyed by other people. Am I then entitled to levy tribute upon them because of this happy fact? (3) In fact, lighthouses *could* easily charge ships for their services, *if* they were permitted to *own* those surfaces of the sea which they transform by their illumination. A man who takes unowned *land* and transforms it for productive use is readily granted ownership of that land, which can henceforth be used economically; why should not the same rule apply to that other natural resource, the sea? If the lighthouse-owner were granted ownership of the sea-surface that he illuminates, he could then charge each ship as it passes through. The deficiency here is a failure, not of the free market, but of the government and the society in not granting a property right to the rightful owner of a resource.

On the necessity of taxing for government lighthouses and other services, Leoni adds the astonishing comment that "in these cases the principle of free choice in economic activities is not abandoned or even put in doubt." (p. 171) Why? Because "it is admitted" that people would be willing to pay for these services anyway, if available on the market. But *who* admits it, and to what extent? And which people would pay?

Our problem can be solved, however; a cogent criterion *does* exist for the content of libertarian law. That criterion defines coercion or constraint, simply, as: the initiation of violence, or the threat thereof, against another person. It *then* becomes clear that the use of coercion (violence) must be confined to coercing the initiators of violence against their fellow-men. One reason for confining our attention to violence is that the unique weapon employed by government (or by any other enforcing agency against crime) is precisely the threat of violence. To "outlaw" any action is precisely to threaten violence against anyone who commits it. Why not then use violence *only* to inhibit those who are initiating violence, and not against any other action or non-action that somebody might choose to define as "coercion" or "constraint"? And yet, the tragic puzzle is that so many quasi-libertarian thinkers have, over the years, failed to adopt this definition of constraint or have failed to limit violence to counteracting violence, and have, instead opened the door to statism by using such vague, jumbled concepts as "harm", "interference", "feelings of constraint", etc. Decree that no violence may be initiated against another man, and all the loopholes for tyranny which even such men as Leoni concede: blue laws, government lighthouses, taxation, etc., would be swept away.

In short, there exists *another* alternative for law in society, an alternative not only to administrative decree or statutory legislation, but even to judge-made law. That alternative is the libertarian law, based on the criterion that violence may only be used against those who initiate violence, and based therefore on the inviolability of the person and property of every individual from "invasion" by violence. In practice, this means taking the largely libertarian common law, and correcting it by the use of man's reason, before enshrining it as a permanently fixed libertarian code or constitution. And it means the continual interpretation and application of this libertarian law code by experts and judges in privately competitive courts. Professor Leoni concludes his highly stimulating and important book by saying that "lawmaking is much more a theoretical process than an act of will." (p. 189) But certainly a "theoretical process" implies the use of man's reason, to establish a code of law that will be an unbreachable and unflawed fortress for human liberty.

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Fertig's "Prosperity Through Freedom"[1]

J. EDWIN MALONE

FOR SOME TIME the average reader in this country has been inundated with the semi-mystical economics of the New Liberals, the authors ranging from such men as Galbraith and Schlesinger to the small-town *literati* writing in the Sunday supplements. They defend, and the next minute attack, individual freedom with all the aplomb of consistent thinkers. While there are several scholarly books which present detailed analyses of the Statists' programs, works of the quality and simplicity of, for example, Hazlitt's *Economics in One Lesson* are rare. Lawrence Fertig, nationally syndicated columnist, has made a worthwhile contribution to this field with his recently published *Prosperity Through Freedom,* a work one could honestly recommend, although it leaves something to be desired as an argument for conservatism. The book ignores what may be an important motivation of our predominantly welfare-oriented public, and a few of the arguments are not as convincing as they might have been had the author risked being more sophisticated in his argumentative style. Mr. Fertig has, perhaps, underestimated both the strength of the public's fear of capitalism's so-called "plague"—depressions—and the public's requirement that unpopular opinions be presented in a more systematic manner.

Private enterprise must be preserved, Mr. Fertig begins, because it achieves those goals which are generally accepted as the ends of a political society; it guarantees human freedom, it provides the most efficient economic system, and it responds to the self-expression of every individual. In view of the brevity and level of analysis of this work, the author is surprisingly successful in showing that welfare statism and socialism consistently fail to accomplish any one of these goals.

There is an outstanding number of widely-accepted illusions in this country about the success of European and Asian experiments with socialist economics, and the author carefully examines the most important of these.

Although *Prosperity through Freedom* is presented in the form of a series of essays covering a great multitude of topics, it is essentially an elaboration of four important contentions introduced in the first chapter. The first of these is that, ". . . today socialism stands repudiated by leading Socialists of the Western world . . . [i.e., the] doctrines formulated by Karl Marx which were at the apex of [their] popularity only a decade ago, are now dead."

Mr. Fertig clearly shows that there is an increasing awareness on the Left of the dangers of concentrating economic power in the hands of government and of the impossibility of reconciling government domination of large industries and the maintainance of a

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[1] A review of Lawrence Fertig, *Prosperity Through Freedom* (Chicago: Regnery, 1961).

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free market. Here he compares the development of West Germany and Great Britain at the end of World War II. It is well known that the British Labor Party, then in control, renounced the doctrine of nationalization of major industries subsequent to their abortive experiment. But in Germany things turned out differently. The United States sent an advisory commission with instructions to help the Germans revamp their economy. According to Mr. Fertig, a U. S. government document, not declassified until 1961, states, in brief, that the committee prescribed inflation. The Economics Minister of Germany, Ludwig Erhard, threatened to resign if this policy were adopted. The German government supported Erhard and the commission left, probably shaking their heads in anticipation of the ruin to come. Interestingly enough, one member of the committee was Walter W. Heller who now heads President Kennedy's Council of Economic Advisers.

Most revealing is Mr. Fertig's contention that we are being urged to embark on a dangerous course of radically altering our economic system to meet the Soviet surge of growth. This, of course, becomes one more reason for increased government interference in the market. But, the author points out, no one has yet been able to prove either that our present growth rate would not be insufficient if the government would cease its interventionist policies, or that Soviet claims concerning their own growth rate are true. He shows, in fact, that present government policy is the real villain in hindering America's economic growth, that several Soviet economic projects have admittedly been rather ludicrous flops, and, by the admission of a leading Soviet economist, the widely accepted growth-rate figures in the Soviet Union are a myth.

The liberals seem to have a special aptitude for piling false premise upon false premise, thereby deriving a maze of unrealistic conclusions. We are told that the Soviet system is the more dynamic, although this is clearly not the case. Next, the liberals say that underdeveloped countries are more interested in food than freedom, and are, therefore, naturally inclined to ally themselves with the more dynamic economic system. In conclusion, they claim, the only way we can compete with the Soviets for popularity is to buy neutrals off. After examining instances in which the "spend-to-defeat communism" program has been attempted, the author contends that even if such a program could be maintained, it could not succeed. He concludes, "You do not kill communism by raising standards and you need not necessarily get it where the standard of living is very low. Communism flourishes where there is no strong opposing ideal to offset it."

Finally, the author examines the argument that the welfare of the people can only be achieved and maintained by increased government spending. He finds that this is a conception not only based on false premisses, but, moreover, a very dangerous one for the economic and political future of the nation:

> Who provides the countless improved conveniences of life — from automobiles and wonder drugs to electric dishwashers and frozen foods? Who provides the means by which people get more education, more medical care, more opportunity for expressing themselves and making progress in life according to their own lights? Plainly, it is business and professional organizations and the people who work in them who advance everybody's welfare and give us the remarkable kind of life which exists in this country. The government has had little to do with this throughout our national history.

Government, states Mr. Fertig, already spends a third of the gross national product and is apparently planning to spend more. It is precisely this that stifles investment in industry and thereby prevents an increase in productivity. Sharing with the government the responsibility for depreciation of the dollar is union labor. But even here, the responsibility is easily traceable to government. It is the legal immunity of labor unions that has allowed them to cut their own throats by totally unrealistic wage demands. Such demands seriously endanger their members' real wages, not

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to speak of the incomes of the majority of workers who have chosen not to join a union, and retired persons who perhaps bear the brunt of inflationary union demands. Of course, the fact that these retired people have savings in what is now an inflated currency becomes merely another reason for increased government welfare spending.

Prosperity Through Freedom does not present sophisticated and detailed analyses of these problems. It is directed primarily to the reader who has little more than an introductory knowledge of economics. Mr. Fertig's arguments are presented in quite readable style, often citing actual examples to contradict the beliefs of the New Liberals. The drawback to this method of argumentation lies in the fact that it will take only a perceptive reader, not necessarily a sophisticated economist, to notice that the author's heavy reliance on example isn't really conclusive. Only detailed and logical analysis of these problems can successfully refute the New Deal philosophy. Well chosen examples, by themselves, can be, and often are, explained away by claiming that they are merely exceptions to the rule.

Only once does the author make what appears to be a mistake common to conservative critics. He is perfectly justified in his criticism of the strong Keynesian bias in college economics courses. But he extends his argument by saying that teachers should be "subjective" in pointing out the advantages of the free enterprise system—i.e., college courses should be biased in favor of the conservative position. Why conservatives who are convinced that the facts clearly justify capitalism still hesitate to approve an objective presentation of those facts in the classroom is something of a mystery to the reviewer.

More important, Lawrence Fertig fails to come to grips with what may well be the central issue. It is probably the case that most people are content to allow the government to play a dominant role in the economy because of their belief that the free-market system is inherently plagued with periodic depressions. Although realizing the importance of this view, he offers no argument against it. In failing to do so, I believe that he has done a serious disservice to the purpose of the book.

In short, while *Prosperity Through Freedom* will win few converts to *laissez faire,* it will at least demonstrate to our unaware public the practical dangers to individual liberty and well-being of an increasingly large and dominant government.

NEW BOOKS AND ARTICLES

THE FOLLOWING IS A SELECT LIST OF BOOKS AND ARTICLES WHICH, IN THE OPINION OF THE EDITORS, MAY BE OF INTEREST TO OUR READERS.

Campaigne, Jameson G., *Check-Off: Labor Bosses and Working Men,* (Regnery, Chicago, 1961).

Conant, James, *Slums and Suburbs,* (Harper, New York, 1961).

Evans, M. Stanton, *Revolt on the Campus,* (Regnery, Chicago, 1961).

Hazlitt, Henry, *Economics in One Lesson,* (new paperback edition published by the Foundation for Economic Education, Irvington-on-Hudson, New York: 50¢).

Jacobs, Jane, *The Death and Life of Great American Cities,* (Harpers, New York, 1961).

Meyer, Frank S., *Freedom, Tradition, Conservatism,* and Evans, M. Stanton, *A Conservative Case For Freedom,* (The Intercollegate Society of Individualists, Philadelphia, 1961. Free copy available from ISI, 1014 Lemcke Building, Indianapolis 4, Indiana).

St. John-Stevas, Norman, *Life, Death and the Law,* (University of Indiana Press, 1961).

Talmon, J. L., *Political Messianism: The Romantic Phase,* (Praeger, New York, 1960).

Walcutt, Charles C., (ed.) *Tomorrow's Illiterates,* (Little, Brown and Co., New York ,1961)

Weaver, Richard M., "The Importance of Cultural Freedom," *Modern Age* (Winter 1961-1962).

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THE EDITORS OF NEW INDIVIDUALIST REVIEW . . .

have been much encouraged by the enthusiastic response which the appearance of a new periodical has elicited from people all over the United States. One of our editors blind-folded himself and drew a random sample of these letters out of a well-mixed box. These are some of those comments.

"Although your magazine purports to be Right-wing, it is obvious to any informed person that most of your articles are designed to subtly brain-wash uncritical readers. Your advocacy of freedom of speech for Godless Communistic conspirators is but one obvious example. We know that the enemies of our Republic are very adept at the techniques of infiltration so I am not too surprised that their handiwork is visible in the New Individualistic Review."

Elizabeth Carpin, Houston, Texas

"In tone, style and content, this piece reminds one of a Sunday tabloid expose . . . [Bruce Goldberg's review of Ayn Rand's "For the New Intellectual"] is less accurately described as an attempt at philosophical analysis than an act of juvenile delinquency . . . Mr. Goldberg has not . . . learned the elementary rules of civilized discourse . . . What I primarily object to is his manner of expressing his views—the personal abuse, the hooligan style, and Mr. Goldberg's barbarian hysteria."

Nathaniel Branden, New York City

". . . bright young fascists like yourselves are well-qualified to join the intellectual Swiss Guard of the economic royalists. I envy the futures you have ahead of you; in return for your talents as propagandists the leaders of the military-industrial complex will see to it that you are well-supplied with fat expense accounts, call girls, champagne and with any other indulgences your hearts may desire . . . "

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"SOCIALISM is only an idea, not an historical necessity, and ideas are acquired by the human mind. We are not born with ideas, we learn them. If socialism has come to America because it was implanted in the minds of past generations, there is no reason for assuming that the contrary idea cannot be taught to a new generation. What the socialists have done can be undone, if there is a will for it. But, the undoing will not be accomplished by trying to destroy established socialistic institutions. It can be accomplished only by attacking minds, and not the minds of those already hardened by socialistic fixations. Individualism can be revived by implanting the idea in the minds of the coming generations. So then, if those who put a value on the dignity of the individual are up to the task, they have a most challenging opportunity in education before them. It is not an easy job. It requires the kind of industry, intelligence and patience that comes with devotion to an ideal."

—*Frank Chodorov*, Founder and President, Intercollegate Society of Individualists, Inc.

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